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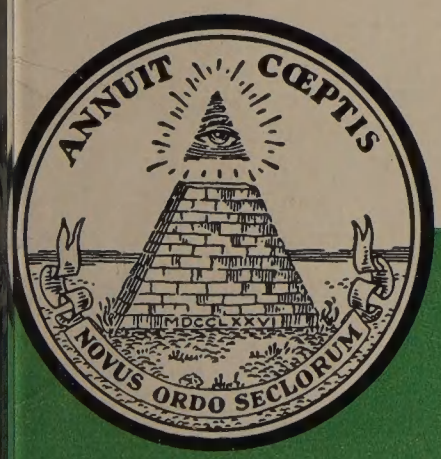
The '50 Election: Its Meaning To Congress And To The Nation

Featured

Congress Takes A Careful Look At The UN's Genocide Treaty

PRO *and* CON



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CONGRESSIONAL DIGEST

DECEMBER, 1950 VOL. 29, NO. 12

THE MONTH IN CONGRESS

The '50 Election: Its Meaning To Congress and to the Nation

THE 1950 election has resulted in a considerable upsurge by the Republican Party and by the same token, of course, a fairly stiff defeat for the Administration Democrats.

While the party out of power normally makes gains in non-Presidential election years, the size of the Republican gain in 1950 seems to have caught almost everyone by surprise—as did the Truman victory in 1948.

At least no experienced political group was making confident predictions of a resounding sweep for its party prior to election day. No doubt, some caution was engendered by the Democratic "miracle" of two years ago, but most politicians, other than those connected with the Republican and Democratic national committees whose job it is to be optimistic, seemed to feel that the status quo would be pretty well maintained.

An Error in Judgment

How wrong they were can be seen from the figures on the current 81st Congress as compared with the incoming 82nd Congress which will convene in January.

The present Senate consists of 54 Democrats and 42 Republicans. The new Senate in 1951 will consist of 49 Democrats and 47 Republicans.

At present the House of Representatives contains 259 Democrats, 170 Republicans, 1 Democrat-Liberal, 1 American-Labor and 4 vacancies.

The new House of Representatives will consist of 234 Democrats, 199 Republicans, 1 Democrat-Liberal and 1 Independent.

Changes in the Senate

Republicans in the Senate picked up 6 new seats and dropped one, for a net gain of 5.

In Illinois former Representative Everett Dirksen defeated the Senate's majority leader, Scott Lucas.

In Maryland a political newcomer, John M. Butler, defeated Millard Tydings, a three-term Senator and chairman of the Senate's Armed Services committee.

In California, Richard Nixon of the House Un-American Activities committee defeated the Democrat's liberal glamour-girl, Helen Gahagan Douglas.

In Utah, former NAM president Wallace Bennett defeated the venerable Elbert Thomas, chairman of the Senate Labor and Public Welfare committee.

In Pennsylvania, former Governor James Duff defeated the Senate's majority whip, Francis Myers.

In Idaho, Herman Welker defeated former Senator D. Worth Clark after the latter had ousted the incumbent Glen Taylor in the Democratic primaries.

Meanwhile, in President Truman's home state of Missouri, the Democratic candidate, Thomas C. Hennings, defeated the Republican incumbent, Forrest Donnell.

Changes in the House

House Republicans, as we have seen, picked up 29 seats while the Democrats lost 25.

Democrat-Liberal Franklin D. Roosevelt, Jr., of New York City retained his seat. However, American-Laborite Vito Marcantonio, the pro-Communist representative from New York City, was beaten by a coalition alignment against him. The new Independent representative is Frazer Reams of Ohio.

Few of the House changes involved the names of the better-known House members. However, besides Representative Nixon of California, two other House members of the current Congress will move over to the Senate

for the 82nd Congress. They are Mike Monroney, Oklahoma, Democrat, who defeated Senator Elmer Thomas, chairman of the Senate Agriculture committee, in the primaries; and Francis Case, Republican of South Dakota, who defeated the ranking Republican on the Senate Armed Services committee, Chan Gurney, in the primaries. Helen Douglas, who lost to Nixon in the California Senate race, has been a House member. Also Representative Kingsland Macy of New York, who figured in the Republican senatorial mix-up involving Lt. Governor Joe Hanley, was defeated.

The Meaning to Congress

So far as the exact effect of the election on Congress is concerned, time will tell its own story. But at least two immediate effects will issue.

One of these involves the membership on committees.

Senate committees now average about 8 Democrats and 5 Republicans. Under the new arrangement it seems likely that Senate committees will average out to 7 Democrats and 6 Republicans.

House committees now average about 16 or 17 Democrats and 10 or 11 Republicans. In the coming Congress the ratio will probably be about 15 Democrats and 12 or 13 Republicans.

Incidentally, the Senate was saved from an embarrassing situation when Senator William Benton, Connecticut, Democrat, squeaked through to a win over Republican nominee Prescott Bush by a bare handful of votes. Had Senator Benton lost, the Senate would have been tied with 48 Democrats and 48 Republicans—a situation which has occurred but once in our history: in 1880 when James A. Garfield was elected President and the Senate was evenly divided with 38 Senators each. However, if Benton had lost the Democrats would still have organized the Senate, the Vice President having a ballot in tie votes and the organization of the chamber being a procedural matter which is voted upon.

The second immediately discernible effect of the election on Congress will be to strengthen the so-called "coalition" of Republicans and Southern Democrats which has pretty much dominated Congress ever since the late stages of World War II.

No radical or extremely controversial legislation sponsored by the Administration has been able to get by the coalition in the past decade, and the 1950 election has strengthened the coalition considerably since both the Republicans and the conservative Southern Democrats have increased their membership. Few Southern House members have been sympathetic to the Administration's "Fair Deal" program; and the South's two Senators who were sympathetic to it, Claude Pepper of Florida and Frank Graham of North Carolina, were both defeated in Democratic primaries.

Trend in the States

The Republican trend which the election revealed was even more pronounced in the States than in Congress.

Of 33 States in which Governors were elected this year, Republicans elected 21. In addition, the governorship of Michigan is still undecided, the result being so close that a recount is underway. Four States, Arizona, New Mexico, Nevada and Maryland, which are normally Democratic, elected Republican governors. Of the 12 States which might easily elect from either party, Democrats won only two, in Ohio and Massachusetts. And of the 11 governorships which the Democrats did win, 7 are in the Solid South where Republicans have no chance.

This State record, particularly, has made the national Democratic organization unhappy.

The Meaning to the Nation

It is always fascinating to hold post mortems on elections and discuss the reasons for their outcome. It is also a pastime which experience indicates to be of highly doubtful accuracy.

After the 1946 election in which Republicans won control of both houses of Congress, the GOP was quite vocal in its opinion that it had a decided "mandate" from the people to overturn everything the Democrats had been doing for the past 15 years. Two years later when President Truman was reelected and the Democrats took back control of Congress, the Democrats were equally vocal in pronouncing their "mandate" to carry on the "Fair Deal."

No doubt many causes contributed to the results of the 1950 election. But one thing seems sure. Which is that if the Republicans mistook the reasons for their favor with the voters in 1946, the Democrats were equally mistaken in their understanding of the 1948 election.

So far the Republicans have been relatively quiet about their 1950 victories. There are indications that the national GOP organization is willing to forget them already and buckle down to seeing what can be done about 1952. If so, the Democrats have honest cause for worry.

One other significance of the election also seems pretty well established on the basis of Senator Taft's overwhelming victory in Ohio. Inasmuch as Big Labor and the national Democratic organization had both gone all out to defeat the GOP "strong man" in Ohio, the tide in favor of Taft makes it reasonably plain that the labor unions, as such, are not able to control the political ballot of their members.

It Can Still Happen Here

But regardless of one's political convictions, the 1950 election must carry comfort to every American in the thought that it is still possible in the U. S., as it is not possible in so many other nations, for the "outs" to turn out the "ins"—even after a 20-year political entrenchment by the controlling party.

Congress Takes A Careful Look At The UN's Genocide Treaty

He Is Next To The Gods . . . Who Can Measure Punishment With Discretion.
—CLAUDINAUS

THE SO-CALLED Genocide Treaty, or Convention, promises to become one of the most controversial documents to reach the Congress of the United States in many years.

This is not because of the immediate subject matter of the Treaty itself, but because of the implications it may carry for the U. S. as a sovereign nation.

Genocide—which means the killing or other liquidation of members of a certain race or group with the intent to wipe out that group, or a part of it—has no practical importance for the U. S. whatever. No genocidal practice has ever occurred in the U. S., nor is it likely to. The chief reason why Congress is asked to ratify the Genocide Treaty, which makes genocide a crime in international law, is for the moral force such ratification may exert on the rest of the world—particularly the totalitarian states.

The Treaty results from the hideous atrocities committed by modern dictators in their efforts to eliminate political opposition and racial or national groups distasteful to them. (Nazi treatment of the Jews and the Soviet purge of national Ukranians and Poles are good examples.) The Treaty, which is a multi-lateral affair and which has originated in and through the United Nations, is an effort to assist in halting such crimes.

But the Treaty takes a new tack.

Historically, international law has dealt with the responsibility of the nation or the sovereign state. The Genocide Treaty would carry over into peacetime the new theories of international law as promulgated by the War Crimes Trials in Nuremberg and Tokyo—that the individual is responsible to, and punishable by, international authority, either directly or indirectly.

For the U. S. this Treaty carries unique problems. There are many reasons why, which the material following and the Pro and Con discussion clearly develops. But at the base of most of the problems is the provision in the U. S. Constitution which automatically makes treaties the "supreme law of the land," along with the Constitution itself and Federal statutes. (This situation does not exist under the laws of any other nation.) State laws in conflict with treaties are therefore invalid, and the Genocide Treaty deals in matters which in America are traditionally and legally within the province of the States.

Hence the question: Is this Treaty, and other similar ones now being drafted, a step toward "government by treaty?" Regardless of the answer, the asking of the question seems entirely in order.

In regard to the domestic law of the U. S. the issues raised by this question are extremely important. Even the foremost of the Treaty's sponsors admit to some of these difficulties. They add, however, that what the world needs for dealing with international crime is "statesmen, not lawyers," and that if one looks to the *intent* of the Treaty's drafters most of the objections will lose their force. To this the lawyers are inclined to reply "we've heard that before!" And they point to history with its various instances of loosely drawn laws being interpreted almost 180 degrees contra the intent of their designers.

The tone of the controversy is presently pitched to why the U. S. should reject the Treaty rather than why it should be ratified and the Senate committee which has investigated the Treaty is considering attaching four reservations before recommending it to the full Senate (page 298). Such reservations, in effect amendments, cannot be forced on other countries. Since the Treaty becomes operative next month among 24 nations which have already ratified, reservations create further problems. At this writing the UN is about to ask the World Court for an opinion on whether reservations to a multi-lateral treaty can be effective among nations accepting them without abrogating the treaty for the other signers.

It should be pointed out that the reservations now being discussed might satisfy some of the Treaty's present critics. As yet, however, they have not been considered or adopted by the Senate, nor agreed to by other nations.

Finally, the Genocide Treaty's problems are small in comparison with those likely to result from the UN's Declaration of Human Rights when that covenant is completed in treaty form. However, they are sufficient to show that, as the American Bar Association suggests, U. S. participation may require either a Constitutional amendment or liberal use of reservations.

Treaties, et al—Defined

HOW MAY the United States enter into formal covenants with other nations? There are three answers, as follows:

1. By a treaty proper, negotiated by the Executive, with the advice and consent of the Senate, two-thirds of the Senators present concurring.

2. By executive agreement, negotiated and executed by the Executive alone, under his Constitutional authority, without express approval of Congress.

3. By statutory (or legislative) agreement, in which the Executive already has or expects to receive legislative approval of both Houses of Congress for agreements entered into.

The Treaty

Since we are primarily concerned here with a treaty, it will be appropriate to consider further the technical definition of a treaty. The one following is taken from the *Dictionary of American Politics,* 1944:

"A treaty is a solemn agreement or compact between two or more sovereign states for the purpose of creating, altering or extinguishing mutual rights and reciprocal obligations. Treaties are made by negotiation, followed by formal ratification by the head of the treaty-making power. They may be ended by the accomplishment of the purposes for which they were made, by the expiration of a time limit, or by creation of a new treaty.

"Denunciation by one state, unless provision is made for it in the treaty, may be regarded as a breach of faith. A war between states is usually held automatically to end all treaties between them.

"For the enforcement of their provisions, treaties depend on the honor and interest of the governments which are parties to them. If these fail, an aggrieved state may make diplomatic protests, apply economic or other sanctions, or, as a last resort, declare war.

"Treaties are classified as *bilateral* if only two states are parties; *multilateral* if more than two accede; *executed* or *transitory* if they relate to a single object which is at once disposed of; and *executory* or *permanent* if they relate to acts to be performed whenever the conditions specified in the treaty are present.

"In the United States, treaties are negotiated under the direction of the President and must be ratified by a two-thirds vote of the Senate.

"According to the Constitution (Art. VI) 'All treaties made, or which shall be made under the authority of the United States are a part of the supreme law of the land.' In domestic law, they take precedence over State constitutions and statutes and are on an equal footing with valid laws of Congress; i.e., a treaty may void the provisions of a prior statute and vice versa. . . ."

Executive Agreement

The pure executive agreement, which is entered into by the President as the head of the American state, does not require any legislative authorization.

Most executive agreements are minor ones, involving such matters as the settlement of pecuniary claims of American citizens against foreign countries. In making such arrangements the Executive has taken appropriate steps to obtain redress for infringements of rights of American citizens under treaties and under international law. In addition to commercial matters, the Executive Agreements relate to a great number of other subjects such as: waiver of visa fees, debt funding, exchange of information concerning narcotic drugs, air navigation, pilot licenses, certificates of airworthiness for aircraft, exchange of official publications, recognition of load line certificates, radio, trade marks, and copyrights.

Statutory Agreements

The statutory agreement is also, of course, negotiated by the President. But it depends upon some act of Congress, passed by majority vote of both Houses, for its authority.

The first type of statutory agreement is that in which the Executive acts under authority of a specific act of Congress, as in postal arrangements with foreign nations, reciprocal trade agreements, agreements with Indian tribes, reciprocating copyright and trademark agreements.

The second type of statutory agreement is that which is made by the President, but is of such a nature that it requires an act of Congress to be put into effect. Perhaps the best current example of this type is the long-pending agreement (1941) between the U. S. and Canada for development of the St. Lawrence Seaway. (*Congressional Digest,* October 1946.) The Seaway has never been commenced since Congress has failed to approve the agreement or supply funds for its undertaking.

Binding Feature

It should be noted that there is an important underlying feature which, for the U. S., distinguishes the treaty from other types of agreements. The treaty is binding on the nation according to its terms. The others may be withdrawn or rescinded at the pleasure of Congress or the President.

U. S. Treaty History

SINCE THE birth of the nation in 1789, the records show that something like 1300 treaties have been signed by the United States. Of these close to 1,000 have been brought into force.

Besides peace treaties, here are a few of the subjects covered:

Acquisition of territory, boundary settlements, disposal of boundary waters, reparations, conduct of commerce, extradition proceedings, postal arrangements, property rights, use of canals, naturalization, immigration, trademarks and patents, claims, tariffs, sanitation, telegraph and radio regulations, commercial aircraft arrangements, loans, smuggling, fishing rights, etc.

Some Well-Known Treaties

Among prominent treaties of the U. S. which occupy an important spot in American history are these international agreements:

The Jay Treaty of 1794, negotiated with Great Britain to avoid another war; the issues which the treaty attempted to solve were largely due to objectionable British practices held over from the era of the Revolution.

The Louisiana Purchase of 1803, negotiated by President Jefferson's administration with France. The Treaty of Ghent, 1814, negotiated with Great Britain to end the War of 1812. Treaties with Algiers, Tunis and Tripoli in 1815, which put an end to the troublesome pirate activity of the Barbary States. The Oregon Treaty of 1846, negotiated with Great Britain, which determined the extent of the American Northwest.

In the Civil War era — and afterwards — numerous treaties were concluded with various countries relative to the African slave trade. The seal fishery treaties of the 1890's, negotiated with several nations, determined rights in the Bering Sea.

The Treaty of Versailles, 1919, at the end of the World War I, rejected by the U. S. Senate.

The Naval armament limitation of 1922, negotiated with France, Great Britain, Italy and Japan, to determine the size and power of the world's leading naval forces, and looking toward disarmament.

Recent Treaties Completed

In recent years probably the outstanding treaties entered into by the U. S. have been the United Nations Charter in 1946, and the Treaty of Rio, which is a security arrangement of the Pan American nations, completed in 1948.

The total number of treaties which the U. S. has negotiated but which have never come into force now stands at about 330. This is not to say that all these treaties were rejected, for there are many reasons why a treaty may never come into force.

Some, for example, are not submitted by the Executive to the Senate; some are withdrawn after being submitted to the Senate; some simply are never acted upon; subsequent circumstances make others useless to consider; still others may be accomplished through extra channels such as executive or statutory agreements.

A Number Still Pend

Of the 300-odd treaties of this type, only about 30 are still regarded as "pending." The others are classified as "unperfected"—i.e., defunct. The general rule is that a treaty submitted to the Senate, on which no final action has been taken, is still pending unless: the Senate has returned it to the Executive, or the Executive has withdrawn it. An exception arises in the case of a treaty that has hung fire up to the point where its provisions are clearly obsolete. But this seems to be a matter of circumstance rather than of time. An "unperfected" treaty only a year old may be clearly obsolete; on the other hand, the Isle of Pines treaty signed with Cuba in 1904 rested before the Senate for 21 years before it was ratified. So no hard and fast rule is available on "pending" treaties.

It is important, however, to note the difference between treaties pending and domestic legislation pending before Congress. There is no time limit on the former, as we have seen. Ordinary Federal legislation, however, must be completed within the 2-year life span of each Congress—or else be reintroduced and undergo the entire legislative process again in some future Congress.

Up to the present time about 190 treaties have been amended by the Senate, about one-third of which eventually failed. The Senate has rejected 17; there has been no final action on about 90; and 21 have been withdrawn.

In recent years many international matters which formerly would have been submitted to Congress as treaties, have been acted upon as executive agreements or submitted as joint resolutions to both Senate and House. In the first instance Congress usually authorizes the President so to act, as with reciprocal trade agreements, etc.

Treaties Under Our Constitution

WE TURN now to the precise wording of the basic law from which comes the specific treaty-making authority and the foreign relations power in general: the United States Constitution.

Probably the two most important clauses from the treaty standpoint are these:

Art. II, Sec. 2, Cl. 2: "He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

Art. VI, Cl. 2—"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

There has never been any legal dispute concerning the President's authority to negotiate treaties and agreements with foreign countries, although there has been some dissension in regard to what is—and what is not—proper subject matter for treaties. Supreme Court dictum since 1840, however, when a decision was rendered in *Holmes* v. *Jennison,* has sanctioned wide discretionary powers in this respect.

"The power to make treaties is given by the Constitution in general terms," it is held, "without any description of the objects intended to be embraced by it, and, consequently, it was designed to include all those subjects which in the ordinary intercourse of nations has usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions and the distribution of powers between the General and State governments."

The provision itself illustrates the checks-and-balance system employed throughout the Constitution. For while the President is set up as the agency for negotiation, the Senate is designated as the instrument of ratification. Neither party can be effective without the other. The President's power, no doubt, is the more positive, or kinetic, of the two. In addition to negotiating treaties, he may call a halt to their proceeding at any time until consummated—even after submitted to the Senate or after the Senate may have ratified. By the same token the Senate's power is not limited to a power of veto, for judicial interpertation has established that the Senate may make its approval conditional upon the adoption of specified amendments or reservations.

The second provision cited above, which makes treaties, as well as the Constitution itself and Federal statutes, the supreme law of the land, caused for a time a good deal of controversy. This was particularly true in connection with questions involving the conflict of treaties with provisions of Federal law. Where such circumstances arise, the following doctrine, promulgated in Supreme Court annotations, now prevails:

"By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self executing."

Most of these matters are actively in play in the present controversy over the Genocide Treaty.

For example:

- The provision which gives treaties precedence over State laws is responsible for the great concern of the individual States and of constitutional lawyers.
- A question arises as to whether the Genocide Treaty may be in conflict, in its subject matter, with the intent of the Constitution—although it should be noted that no treaty has ever been held unconstitutional by a U. S. court.
- There is doubt as to the effect of the four "understandings" which the Senate Foreign Relations committee has attached (page 298) to the treaty. If these are, in effect, amendments, then the attitude of other nations toward the treaty may be altered somewhat.

While many other Constitutional provisions contribute indirectly to the foreign relations power, two are particularly pertinent here:

1. Art. III, Sec. 2, Cl. 1—"The judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority.

2. Art. I, Sec. 8, Cl. 10—The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations.

It is under the first of these clauses that Federal courts are given authority to construe the meaning of treaties and to settle disputes arising under them.

The second clause cited is that on which a main phase of the Genocide argument turns—namely, the question of whether the treaty would be self-executing prior to Congressional action based on this particular authority.

How the Genocide Treaty Developed

"GENOCIDE" IS, of course, a new word for an old practice. Basically it means group destruction, and it has been in evidence at various times since the dawn of history.

A few examples might include the extinction of Carthage by the Romans, the Turkish massacres of the Armenians, and, more recently, the wholesale slaughter of Poles and Jews by the Soviets and the Nazis.

How the Word Derives

The term itself is a contraction of two ancient words—the Greek word "genos," meaning race or tribe, and the Latin word "cide," meaning to kill.

The term was coined during the late war by a refugee Polish lawyer named Raphael Lemkin. Mr. Lemkin, now a professor at the Yale University Law School, knew something of "genocide" practices first hand, having been forced out of Warsaw by its introduction there. He has been a prime mover in the development of the Genocide Treaty, or "Convention" as it is officially called, in the UN.

The Genocide Convention is the end result of the theory held by Lemkin, and others within the United Nations, that the prevention and punishment of genocide requires international action. In many ways it appears to be a development subsequent and corollary to the Nuremberg Trials in which individuals rather than governments are held responsible for "international" crimes —not only in time of war, but in time of peace as well.

A Shift in Viewpoint

At this point, it might be noted that the original intent of the U. S. Government in participating in the drafting of the Treaty was to have such treaty acknowledge that genocide could not exist without at least tacit approval of the government under which it operated. Somewhere along the line, however, this position was abandoned so that the treaty follows the technique of placing responsibility for the crime almost exclusively with individuals. Why or how this occurred appears to be the private knowledge of our Government officials, but it also appears to have required the replacement of the original U. S. delegation to the UN's Genocide Committee with delegates more sympathetic to the "individual" approach.

In any case, the initial action toward promulgation of the Genocide Treaty came on November 2, 1946, when the delegations of Cuba, India, and Panama requested the Secretary-General of the United Nations to include in the agenda of the General Assembly an additional item: the prevention and punishment of the crime of genocide. The Assembly referred the item to its Sixth (Legal) Committee for study.

Work Begins

At its plenary meeting on December 11, 1946, the Assembly adopted, without debate and unanimously, a draft resolution submitted by its Legal Committee. This resolution affirmed that "genocide is a crime under international law." It recommended international cooperation with a view to facilitating the prevention and punishment of genocide, and, to this end, it requested the Economic and Social Council of the United Nations to undertake the necessary studies to draw up a draft convention on the crime.

Pursuant to this resolution a draft convention on genocide was prepared by the ad hoc Committee on Genocide in the spring of 1948, under the chairmanship of the current United States representative on this committee, Mr. Ernest A. Gross, State Department legal adviser. This draft was again discussed by the Economic and Social Council in July and August of 1948 in Geneva, Switzerland, and then in the Legal Committee of the General Assembly at its third regular session in Paris, where again the United States delegation played an important role in the formation of the draft convention.

On December 9, 1948, the General Assembly unanimously adopted the convention to outlaw genocide.

Treaty Signers Are Limited

However, only 20 nations signed the Treaty as participants: Australia, Bolivia, Brazil, Dominican Republic, Ecuador, Egypt, Ethiopia, France, Haiti, Liberia, Mexico, Norway, Pakistan, Panama, Paraguay, Peru, the Philippines, the United States, Uruguay and Yugoslavia.

Of these signatories, the following have ratified through their respective governmental processes: Australia, Ecuador, Ethiopia, France, Haiti, Liberia, Norway, Panama, the Philippines and Yugoslavia.

The following nations have also signed and ratified since the Treaty's original promulgation: El Salvador, Iceland, Guatemala, Israel, Monaco, Jordan, Saudi Arabia, Bulgaria (with reservations), Turkey, Vietnam, Ceylon, Cambodia, Costa Rica, Korea.

The treaty, by its terms, comes into effect among its ratifiers when 20 have ratified. Hence it officially becomes effective among the 24 nations next above on January 12, 1951—90 days following ratification by the 20th nation.

Text of the Genocide Convention

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.

Hereby agree as hereinafter provided:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(*a*) Killing members of the group; (*b*) Causing serious bodily or mental harm to members of the group; (*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (*d*) Imposing measures intended to prevent births within the group; (*e*) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(*a*) Genocide; (*b*) Conspiracy to commit genocide; (*c*) Direct and public incitement to commit genocide; (*d*) Attempt to commit genocide; (*e*) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

(*Continued on page* 320)

The Executive's View of the Treaty

While the Genocide Treaty is generally self-explanatory, it is helpful to review it in the light in which it has been understood and signed by the Executive branch of our Government. Hence the following. It is taken from the interpretation of the treaty as prepared by Acting Secretary of State, James Webb, submitted to the Senate, June 16, 1949.

THE BASIC purpose of the convention is the prevention of the destruction of a human group as such. The first resolution of the General Assembly on this subject, adopted unanimously by the members of the United Nations on December 11, 1946, succinctly pointed out that—

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.

The distinction is that in homicide, the individual is the victim; in genocide, it is the group.

The Genocide Convention contains 19 articles. Of these, the first 9 are of a substantive character, and the remaining 10 are procedural in nature.

Article I carries into the convention the concept, unanimously affirmed by the General Assembly in its 1946 resolution, that genocide is a crime under international law. In this article the parties undertake to prevent and to punish the crime.

Article II specifies that any five acts (page 296) if accompanied by the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, constitutes the crime of genocide:

This article requires that there should be a specific intent to destroy a racial, religious, national, or ethnical group as such in whole or in part. With respect to this article the United States representative on the Legal Committee said:

I am not aware that anyone contends that the crime of genocide and the crime of homicide are one and the same thing.

However, if an individual is murdered by another individual, or by a group, whether composed of private citizens or government officials, as part of a plan or with the intent to destroy one of the groups enumerated in article 2, the international legal crime of genocide is committed as well as the municipal-law crime of homicide.

The destruction of a group may be caused not only by killing. Bodily mutilation or disintegration of the mind caused by the imposition of stupefying drugs may destroy a group. So may sterilization of a group, as may the dispersal of its children.

Article III of the convention specifies that five acts involving genocide shall be punishable (page 296).

The parties agree, in article IV, to punish guilty persons, irrespective of their status.

In article V the parties undertake to enact, "in accordance with their respective constitutions," the legislation necessary to implement the provisions of the convention. The convention does not purport to require any party to enact such legislation otherwise than in accordance with the country's constitutional provisions.

Article VI makes it clear that any person charged with the commission of any of the five genocidal acts enumerated in article III shall be tried by a court of the state in whose territory the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those states accepting such jurisdiction. Thus, the commission in American territory of genocidal acts would be tried only in American courts. No international tribunal is authorized to try anyone for the crime of genocide. Should such a tribunal be established, Senate advice and consent to United States ratification of any agreement establishing it would be necessary before such an agreement would be binding on the United States.

By article VII the parties agree to extradite, in accordance with their laws and treaties, persons accused of committing genocidal acts; none of such acts is to be considered a political crime for the purpose of extradition. Existing United States law provides for extradition only when there is a treaty therefor in force between the United States and the demanding government. Only after Congress has defined, and provided for the punishment of, the crime of genocide, and authorized surrender therefor, will it be possible to give effect to the provisions of article VII.

Article VIII recognizes the right of any party to call upon the organs of the United Nations for such action as may be appropriate under the Charter for the prevention and suppression of any of the acts enumerated in article III. This article merely affirms the right of the United Nations to call upon an organ of the United Nations in matters within its jurisdiction.

Article IX provides that disputes between the parties relating to the interpretation, application, or fulfillment of the convention, including disputes relating to the responsibility of a state for any of the acts enumerated in article III, shall be submitted to the International Court of Justice, when any party to a dispute so requests. I recommend ratification of the convention with the understanding that article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals.

The Genocide Treaty In The Senate

PRESIDENT TRUMAN officially transmitted the Genocide Treaty to the Senate on June 16, 1949. In his letter of transmittal the President disclosed the policy of his Administration toward the treaty as follows:

"By the leading part the United States has taken in the United Nations in producing an effective international legal instrument outlawing the world-shocking crime of genocide, we have established before the world our firm and clear policy toward that crime. By giving its advice and consent to my ratification of this convention, which I urge, the Senate of the United States will demonstrate that the United States is prepared to take effective action on its part to contribute to the establishment of principles of law and justice."

Senate Begins Study

The treaty was referred to the Senate Committee on Foreign Relations which, in its own words, "recognized that there were several novel features involved which would require careful study."

Accordingly a subcommittee was set up under the chairmanship of Senator Brien McMahon, Connecticut, Democrat, to consider the treaty. Other Democratic members of the subcommittee were Senators Elbert Thomas of Utah and Claude Pepper of Florida, while the Republican members were Senators Bourke B. Hickenlooper of Iowa and Henry Cabot Lodge of Massachusetts.

What happened thereafter is concisely told in the committee's legislative history for the 81st Congress, as follows:

Legislative History

The subcommittee heard representatives of organizations with a combined membership of over 100,000,000 people, who testified in favor of ratification. On the other hand a substantial part of the American Bar Association, including the House of Delegates, presented persuasive arguments against ratification of the convention in its present form.

In hopes of meeting these objections, the subcommittee, on May 23, 1950, reported the convention favorably to the full committee with four specific understandings and one declaration. Since these were given wide publicity as a result of a news conference, but do not otherwise appear in the published committee records, they are reproduced here:

(1) that article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals.

(2) that the United States Government understands and construes the crime of genocide, which it undertakes to punish in accordance with this convention, to mean the commission of any of the acts enumerated in article II of the convention, with the intent to destroy an entire national, ethnical, racial, or religious group within the territory of the United States, in such manner as to affect a *substantial portion* of the group concerned;

(3) that the United States Government understands and construes the words "mental harm" appearing in article II of this convention to mean permanent physical injury to mental faculties.

(4) that the United States Government understands and construes the words "complicity in genocide" appearing in article II of this convention to mean participation before and after the fact and aiding and abetting in the commission of the crime of genocide.

Declaration

In giving its advice and consent to the ratification of the Convention of the Prevention and Punishment of the Crime of Genocide, the Senate of the United States of America does so considering this to be an exercise of the authority of the Federal Government to define and punish offenses against the law of nations, expressly conferred by article I, section 8, clause 10, of the United States Constitution, and, consequently, the traditional jurisdiction of the several States of the Union with regard to crime is in no way abridged.

The issues raised by the Genocide Convention were discussed in several meetings of the full committee. Since misgivings continued about certain aspects of the convention, the *understandings* were redrafted as *reservations* and were still under discussion at the time Congress recessed.

Treaty Does Not Die

It might be added that the full committee probably will not take up the treaty during the present short remainder of the 81st Congress. However, since pending treaties do not expire with each Congress, the Genocide Treaty can be taken up at any time desired in the future 82nd Congress or thereafter.

Some Troublesome Questions Involved

by CARL B. RIX

Mr. Rix is chairman of the ABA's Committee on Peace and Law through the United Nations (page 303). Following are excerpts from an address before the American Society of International Law, made in Washington, April 29, 1949. In pointing out some of the difficult questions raised by the new UN type of multilateral treaty, Mr. Rix admittedly is not attempting to provide answers but to provoke further discussion.

IN FIRM belief that the freedom of man cannot be destroyed, many nations of the world move forward on a tremendous campaign for peace in a harassed world, for things of the spirit, for supremacy of the mind of man, for the right of the individual to live his own life. As a great leader in the slow, imperfect task of human freedom, this country, as the possessor of a constitutional Bill of Rights, is asked and looked to for assumption of leadership.

In cooperating with this task, problems arise for the people of this country. How can their constitutional structure, their Bill of Rights, be fitted into the developing international picture of human rights without destruction of a cherished system of our division of powers of government, of our ideals and practical necessities?

I

What will be the probable result of the induction into international law of the general principles of individual responsibility for international law?

Traditional international law is the law of states and their relations to each other, with all enforcement and negotiations in the states alone. Hamilton put it, "The law of sovereign and sovereign." Now there is another concept of individual liability in international law which already appears in four fields:

1. Offenses against the laws of war and other war crimes (Nuremberg). 2. The Genocide Treaty. 3. The Human Rights covenant. 4. The Habana Charter (ITO).

Brig. Gen. Telford Taylor has said: "The war crimes trials, at least in western Europe, have been held on the basis that the law applied and enforced in these trials is international law of general application which everyone in the world is legally bound to observe. On no other basis can the trials be regarded as judicial proceedings, as distinguished from political inquisitions."

Article IV of the Genocide Treaty provides: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals."

The Human-Rights covenant is predicated on individual responsibility and will present acute problems in a much wider form. The matter of individual right of petition and responsibility under the covenant has already had lively discussion in the Commission. The United States, China, and other states propose references of disputes to a committee for opinion and conciliation at the request of states only, thus approving the traditional practice. India asked instantly for the right of petition and inclusion of liability and rights of individuals. France did the same in a suggestion of an attorney general for the United Nations for investigation and prosecution of complaints. Australia presented a plan and a charter of a World Court of Human Rights.

The United States, it will be noted, is for individual liability in genocide and for the traditional state liability and rights in Human Rights. Where do we go from here?

II

What is the effect of treaty law as domestic law of the land, as supreme law under the Constitution?

It took an English lawyer, Professor Lauterpacht, to make clear to us anew our constitutional position in these words:

"The distinction between 'domestic law' and 'constitution' is deliberate. As to the first, it is clear that in the absence of a special enactment or declaration by the National Legislature, the Bill of Rights, even when ratified, would not, in most countries, necessarily become part of the municipal law of states ratifying it. In the United States the Constitution provides that all treaties shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

"To that article the courts of the United States have given a generous interpretation, amounting occasionally to an attribution to a treaty of an effect dangerously approaching that of a constitutional amendment. But in other countries a duly ratified treaty is not part of municipal law until it has been made so by an express act of the national legislature.

Involved herein is the difficult question of a treaty which is self-executing in whole or in part. The mere fact of the necessity of implementation by legislation, such as the definition of crimes under international law and fixing penalties, does not make a treaty non-self-executing. Only clear intent in the treaty itself can prevent the automatic operation of the Constitution of the United States. Thus there may be created, as law, a third body of treaty law in this country with no constitutional basis whatso-

ever, of equal dignity with our Constitution, as supreme law of the land, superseding all State constitutions, decisions, and laws of the States covering the same subjects, and probably superior to all prior enacted laws of Congress on the subject. Under international law the duty to implement a treaty fully and completely is of the same high moral order as the obligation of the treaty itself. Congress has never failed to so implement a treaty.

III

Is there no limit to the power of Congress acting under a treaty except that of prohibition in the Constitution?

In spite of the sweeping statements in *Missouri* v. *Holland,* there is highly respectable authority that there are sharply defined limits.

In 1929 Chief Justice Hughes said in part: "This is a sovereign nation; from my point of view the Nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power, that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power."

IV

Shall the treaty-making power be used as the basis for enactment of domestic legislation in the United States?

It would seem that the words of Chief Justice Hughes just given would be answer to this question.

From part 10 of the report of the Committee on Civil Rights, appointed by the President, comes this suggestion following a full discussion of the restricted limits of Federal power of legislation in the field of civil rights:

"10. Power derived from the treaty clause in article II, section 2 of the Constitution, to protect civil rights which acquire a treaty status.

"In its decision in *Missouri* v. *Holland* in 1920, the Supreme Court ruled that Congress may enact statutes to carry out treaty obligations, even where, in the absence of a treaty, it has no other power to pass such a statute. This doctrine has an obvious importance as a possible basis for civil-rights legislation."

V

What is the effect of provisions in the Charter of the United Nations as to human rights, as a surrender of the reservation of jurisdiction over domestic questions? What will be the effect as to surrender of domestic questions if the genocide treaty and a human rights treaty are ratified?

The necessity for extreme care and skill in drafting a treaty is shown by the construction and interpretation of the language used in the Charter of the United Nations as to human rights.

Note how carefully it calls for promoting, assisting, encouraging, recommending, the cause of human rights, without the creation of any contractual liability for recognition of human rights by any state.

But, as we have been reminded by high judicial authority, plain words do not always mean what they say. The reservation of domestic questions, known as article 2 (7), (of the UN charter) is perfectly plain and concise. Certain it is that when the charter was ratified by the United States and other countries, full force and effect was given to that reservation of domestic questions.

It may be of interest to know that in the 1947 meeting of the International Law Association at Prague, a resolution was adopted to set up committees for studying and reporting to the next conference on the legal effects of the Charter in relation to article 2 (7). The report to the human rights committee of the International Law Association at the Brussels (1948) conference is available for study.

Now for some of the surprising conclusions.

"The provisions of the Charter in the matter of human rights and fundamental freedoms express legal obligations binding upon the individual members of the United Nations."

"As a matter of wider principle, it is probably legitimate to assert that the duty of the state to promote the observance of and respect for human rights extends to the obligation to prevent such denial, from whomsoever emanating, of human rights and fundamental freedoms."

"Finally, one of the results of the provisions of the Charter in the matter of human rights and fundamental freedoms is to effect a far-reaching change in the position of the individual in international law. * * * They transfer the inalienable and natural rights of the individual from the venerable but controversial orbit of the law of nature to the province of international law."

In an editorial in the Journal of the Association, Judge Hudson paid his respects to the contention that positive law was created by the Charter in spite of article 2 (7):

"It is difficult to conceive of the possibility of making substantial progress in the development of international

(*Continued on page* 320)

The Influence of Sei Fujii

ONE OF the pivotal arguments on which the Genocide Treaty controversy turns is the question of whether or not the Treaty would be—if ratified—self-executing.

A great abundance of legal material has been presented in Congress to prove the point one way or the other.

Opponents of the Treaty hold that it is self-executing. Its supporters feel certain it is not.

One Theory

On the theory that the Treaty is self-executing, the opposition points out that with no further action by Congress it may supercede or abridge the criminal law of the respective States, treaties being the supreme law of the land. The opposition then cites the case of *Missouri* v. *Holland* (1920), an important treaty case in which the U. S. Supreme Court held that Congress may enact Federal laws to implement a treaty where, in the absence of such treaty, Congress would have no authority to legislate.

Therefore, says the opposition, ratification of the Genocide Treaty will at once produce an invasion of fields of law which traditionally and constitutionally are State provinces. And even if this does not, in fact, occur, then Congress, under the *Missouri* v. *Holland* doctrine, will be able to invade the State sphere without violating judicial precedent.

And the Other

Meanwhile the Treaty's supporters wheel up an imposing array of legal artillery and Supreme Court dicta to prove that treaties, without express provision for same, do not carry force as *domestic* law unless and until they are supplemented by Congressional action. Following which they refer to Article I, Section 8, Clause 10 of the Constitution which gives Congress power "to define and punish . . . offenses against the law of Nations," i.e., international law. Genocide, they say, is such an offense. Attention is then invited to a leading case on this power, *United States* v. *Arjona* (1887), in which the Supreme Court declared that the positive power of Congress to legislate on offenses against international law "does not prevent a State from providing punishment for the same thing."

Therefore, contend the protagonists, there is no question of the Treaty automatically superceding State law. Moreover, the Constitution itself authorizes Congress to legislate on just such matters as genocide and, in any case, there is nothing to keep the States from writing their own laws if they wish.

Both views have been well fortified with competent legal opinion, and had nothing unusual happened to disturb the equilibrium of the situation, the controversy might finally have been settled entirely on other grounds.

But something unusual did happen, something which has disturbed the Treaty's friends considerably and even startled its enemies.

The Fujii Case

In Los Angeles not long ago an elderly Japanese alien named Sei Fujii wanted to purchase some real estate. California's Alien Land Law does not permit aliens to become land owners unless they are qualified and have filed an intent to become citizens. Sei Fujii had been living in the U. S. since 1903 without ever becoming a citizen. Nevertheless, he filed suit against the State of California alleging the Alien Land Law to be (1) unconstitutional and (2) repugnant to the United Nations charter which, by treaty, is part of our national law.

In the superior court of Los Angeles county Sei Fujii lost his case. He appealed to the California 2nd District Court of Appeals. This court tossed the bomb!

The Holding

It held:

(1) That alien land laws such as California's had been attacked for many years as unconstitutional, each such attack failing; that this one also failed.

(2) That, however, the law *was* in conflict with a treaty of the U. S.—the UN charter—and that by reason of its clash with a "supreme law of the land," as our Constitution describes treaties, the State law must be declared invalid.

In other words, this court not only gave substance to the claim of the Genocide Treaty's foes that such conventions might automatically supercede State law, but it did so in the case of a much milder and less specific treaty than the Genocide document. Furthermore, it did so in the face of a provision of the UN charter [Art. 2(7)] which reads:

"Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."

How did the Court reason in making its decision? Here is the pertinent part of its opinion:

"In the period of 30 years since the alien land law was adopted we have revised our opinions concerning the

rights of other peoples. Out of the travail of World War II came the concept of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion as expressed in the Charter of the United Nations.

"The Charter has become 'the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.' (United States Constitution, art. VI, sec. 2.) The position of this country in the family of nations forbids trafficking in innocuous generalities, but demands that every State in the Union accept and act upon the Charter according to its plain language and its unmistakable purpose and intent.

Effect of the Charter

"Since the Charter is now the supreme law of the land it becomes necessary to examine its provisions and guarantees and to interpret it in the light in which it was adopted by the participating nations. The Organization determined in the preamble 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, to promote social progress and better standards of life in larger freedom.' Among the purposes and principles found in article 1 of chapter 1 are 'To develop friendly relations among nations based on respect for the principle of equal rights; to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.' In article 2 it is affirmed that the Organization and its members 'shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.'

"It is agreed in chapter IX, article 55, that 'the United Nations shall promote universal respect for, and observance of, human rights, and fundamental freedoms for all without distinction as to race, sex, language, or religion.' By article 56 it is declared that 'all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55.'

Right to Property Declared

"On December 10, 1948, the General Assembly of the United Nations passed and proclaimed and called upon all member countries to publicize, disseminate, and expound in schools and elsewhere, a Universal Declaration of Human Rights affirming among other things that 'All human beings are born free and equal in dignity and rights. They . . . should act toward one another in a spirit of brotherhood (Art. 1). Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status (Art. 2). . . . Everyone has the right to own property alone as well as in association with others.' This declaration implements and emphasizes the purposes and aims of the United Nations and its Charter.

"Democracy provides a way of life that is helpful; however its promises of human betterment are but vain expressions of hope unless ideals of justice and equity are put into practice among governments, and as well between government and citizen, and are held to be paramount. The integrity and vitality of the Charter and the confidence which it inspires would wane and eventually be brought to naught by failure to act according to its announced purposes. Its survival is contingent upon the degree of reverence shown for it by the contracting nations, their governmental subdivisions and their citizens as well.

"A perusal of the Charter renders it manifest that restrictions contained in the alien land law are in direct conflict with the plain terms of the Charter above-quoted and with the purposes announced therein by its framers. It is incompatible with article 17 of the Declaration of Human Rights which proclaims the right of everyone to own property.

"Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every State in conflict with it. The alien land law must therefore yield to the treaty as the superior authority. The restrictions of the statute based on eligibility to citizenship, but which ultimately and actually are referable to race or color, must be and are therefore declared untenable and unenforceable."

The great importance of the Sei Fujii case in relation to the ratification of the Genocide Treaty is thus self-evident. However, several other notations are in order here.

First, the opinion of the California case was not handed down until April 24, 1950, several months after the Senate's hearings on the Genocide Treaty were concluded. It does not, therefore, take the formidable role in the Committee's discussion (or in our Pro and Con argument) which it otherwise might have. When and if the Treaty comes before the Senate, though, the Fujii case is sure to come in for extensive consideration and is apt to carry great weight if upheld.

Secondly, however, it seems to be the concensus among most lawyers that the Sei Fujii decision is not too well reasoned and that it is likely to be overturned at higher court levels.

The Convention's Friends and Enemies

BEFORE TURNING to the respective arguments pro and con the Genocide Treaty, it may be helpful further to set the stage by pointing out, in general, how the Treaty is being received so far.

In this connection it may be noted that less than a third of the United Nations members signed the original convention, although the action of the General Assembly in approving that document was taken unanimously.

Today, two years later, the Treaty is ready to go into force, but among only 24 of the 59 nations—those which have so far seen fit to ratify.

Only France, among the so-called "Big Five," has ratified. The U. S., which signed the Treaty, has not ratified. Britain, China and Russia have neither signed nor ratified—nor have any other "large" nations with the exception of Australia and Yugoslavia.

Set-Up in the U. S.

Feeling on the Treaty in the U. S. has not yet been fully revealed and probably will not be until the Senate considers ratification—i.e. begins full debate.

The Senate Foreign Relations subcommittee, which held hearings on the Treaty, has commented that it heard "representatives of organizations with a combined membership of over 100 million people, who testified in favor of ratification."

This statement, however, is apt to be misleading.

It is true that the representatives of many organizations went before the committee expressing *general* approval of the Treaty. But many of them recognized there would be legal difficulties to be ironed out by the legal experts. And only a very few had anything resembling a well-documented case to present on specific issues.

Those who did have thoroughly considered presentations—and who favored the Treaty—were: (1) The U. S. Department of State, representing the current Administration; (2) The American Jewish Congress; (3) one or two representatives of foreign national or refugee groups.

As for the opposition, it consisted mainly of delegates from the American Bar Association which is, of course, the largest and strongest legal organization in the country.

From the Beginning . . .

All of these parties have been bound up with the Genocide Treaty more or less from the very beginning.

When the Convention's proceedings were initiated in the UN our official representatives, State Department members, took an active role in formulating the document. At the same time members of the American Jewish Congress, as representatives of a racial group which had suffered severely from genocidal practice during World War II, were invited to sit in and offer their views. This they did.

Meanwhile the American Bar Association had established a Committee for Peace and Law through the United Nations, on which a number of experts in international law were elected to serve. This Committee, among other activities, kept track of the various treaty proposals promulgated in the UN. As a result of its studies and subsequent debate in the ABA's House of Delegates, the Association in 1949 formally voted against the Genocide Treaty as submitted. A small minority of the delegates dissented, but it might be noted that this group was led by Philip Pearlman, who is Solicitor General of the United States and an important member of the Administration's official family.

Meanwhile a further split has developed between the American Bar Association and the Carnegie Endowment for International Peace. This has resulted from a $15,000 grant which the Endowment made available to the ABA. In October of this year the Carnegie group charged the ABA with having misused these funds to fight the Genocide Treaty.

This, of course, is vehemently denied by the ABA which bitingly remarks that it may have misused these funds if it is "misuse" to make "a thorough and impartial analysis of an instrument of international law and arrive at honest conclusions at variance with those of the State Department."

Lines Are Drawn

Thus we see that to a certain extent the battle lines can now be defined. The Administration is officially committed to the Treaty. Most private groups and organizations which have considered the Treaty at all have gone on record in favor of—at least—the Treaty's general principles. More often than not educators and political scientists seem to be in favor.

On the other hand the lawyers of the nation are almost solidly lined up in opposition to the Genocide Convention as it has been submitted to the Senate. They are fighting a powerful, if somewhat lonely, battle at this time.

The attitude of the Senate in regard to ratification, and of the House in regard to substantiating legislation, remains a question.

PRO

Should Congress Reject The UN's Genocide Treaty?

by GEORGE A. FINCH

Mr. Finch is an official of the American Bar Association and Editor of the AMERICAN JOURNAL OF INTERNATIONAL LAW. *This is part of his testimony before the Senate Foreign Relations Committee, January* 25, 1950.

"**AS GENOCIDE** is defined in the convention, it does not apply to the mass killing and destruction of peoples by totalitarian governments. It appeases such governments by making it possible for them to continue as they are doing today behind the iron curtain, without the possibility of bringing legal or moral charges against them for the monstrous treatment of thousands of human beings whom those governments regard as enemies of the Communist states, the same as Hitler and his conspirators treated certain groups in Germany and in occupied countries as the enemies of nazism. The present convention accordingly frustrates the wishes of all civilized people who sincerely believe that genocide as thus truly understood should be outlawed by international law.

"There is not a word in the convention which denounces as genocide the mass killing and destruction of peoples by governments. The only article in which the responsibility of a government is mentioned is article IX, and as to that article the Secretary of State has recommended that the Senate insert an 'understanding' in its resolution of approval relieving the United States Government from responsibility, except its responsibility under the rules of international law already binding upon it and for which no new convention is necessary.

"Article VI of the convention provides that persons charged with genocide shall be tried by a competent tribunal of the state or the territory in which the act was committed. This is an eminently proper provision; but this article continues 'or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.' It is argued that since there is no international penal tribunal now in existence, and since the United States does not propose to accept the jurisdiction of such an international tribunal should one be established, the proposal of this alternative procedure for the punishment of persons charged with genocide is innocuous to this country. This argument fails to take into consideration the statement of an official representative of the United States in the Sixth Committee of the General Assembly of the United Nations at Paris, October 14, 1948, in which he gave this pledge to the other nations taking part in that meeting:

" 'The United States delegation intended, at a later stage, to show the need for the establishment of an appropriate international tribunal.'

"How can it be seriously argued that if the United States proposes to establish an international penal tribunal, as promised by its official representatives at Paris 2 years ago, the Government of the United States will not be bound to make a bona fide attempt to become a party to such international tribunal. Any proposal to send for trial without the limits of the United States any person charged with crime committed within the United States would be clearly unconstitutional. This method of punishing the colonists was one of the particulars of complaint made against King George III in our Declaration of Independence: 'for transporting us beyond seas to be tried for pretended offenses.' When our forefathers obtained their liberty from this and other acts of tyranny, they sought to ban forever that method of punishment by providing in article VI of the Bill of Rights that: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.'

"What I have just said refers only to the proposal to establish an international penal tribunal before which individuals committing crimes in this country may be personally tried. If the Senate of the United States had before it a convention outlawing genocide committed by governments or with governmental connivance or acquiescence, which is the true meaning of the term and which the public thinks is being outlawed by the convention now before the Senate, I would earnestly urge the approval of such a treaty as I am now as earnestly urging the Senate not to ratify the present treaty as submitted.

"I agree with the proponents of the present treaty who have repeatedly stated before you that genocide properly defined has never occurred in the United States and I am confident it never will; but I am not willing by the ratification of the present treaty to give the enemies of our form of government abroad and its critics at home any foundation to argue that our Bill of Rights and our State

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Should Congress Reject The UN's Genocide Treaty?

CON

by DEAN RUSK

Mr. Rusk is U. S. Deputy Undersecretary of State. This is part of the testimony given by him to the Senate Foreign Relations Committee, January 23, 1950.

"**TWICE** all of the states members of the United Nations have declared that genocide is a matter of international concern. Twice all states members of the United Nations have declared that genocide is a crime under international law. All have declared that international cooperation is needed to stop this practice and that states have a duty to put a stop to such practices within their own respective borders. In view of this history, no one can doubt that genocide is a subject within the constitutional power of the Federal Government to define and punish offenses against the law of nations.

"I should like to state here in general that the convention does two things: It defines the crime of genocide, and it obligates states to take measures to prevent and punish genocide within their respective territories.

"Genocide, as defined in article II of the convention, consists of the commission of certain specified acts, such as killing or causing serious bodily harm to individuals who are members of a national, ethnical, racial, or religious group, with the intent to destroy that group. The legislative history of article II shows that the United Nations negotiators felt that it should not be necessary that an entire human group be destroyed to constitute the crime of genocide, but rather that genocide meant the partial destruction of such a group with the intent to destroy the entire group concerned.

"In terms of practical application within the United States, genocide means the commission of such acts as killing members of a specified group and thus destroying a substantial portion of that group, as part of a plant to destroy the entire group within the territory of the United States. It can thus be readily seen that genocide, as defined in this convention, has never occurred in the United States and is not likely to occur here in the future.

"The purpose of the convention is, however, to provide for the prevention and punishment of the crime of genocide. The convention does not purport to substitute international responsibility for states' responsibility, but does obligate each state to take steps within its own borders to protect entire human groups in their right to live.

"It is important to understand the basic international obligation the United States will assume under this convention. In the language of article V of the convention, the United States and the other contracting states would 'undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention, and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.'

"The State Department does not consider this convention to be 'self-executing' in the sense that immediately upon its ratification prosecutions could be instituted in the Federal courts. Before this could take place the Federal Criminal Code would have to be amended by Congress.

"The United States will be under a duty to enact what has been agreed upon in this convention.

"It should be noted that the Genocide Convention does not represent the first instance in which the United States has cooperated with other nations to suppress criminal or quasi-criminal conduct which has become a matter of international concern. The United States is party to the multilateral Convention for Protection of Submarine Cables of 1884 by which the contracting states have agreed to punish persons breaking or injuring submarine cables. The United States is party to a convention of 1911 with Great Britain, Russia, and Japan for the preservation and protection of fur seals in the North Pacific Ocean, whereby the contracting states undertook to prevent their citizens from engaging in pelagic sealing in certain areas of the North Pacific Ocean and 'to enact and enforce such legislation as may be necessary to make effective the foregoing provisions with appropriate penalties for violations thereof.'

"The United States is also party to the multilateral convention to Suppress the Slave Trade and Slavery of 1926, whereby the contracting states agreed to impose severe penalties not only to repress the slave trade and slavery but also conditions of forced labor. (Existing legislation was adequate, so this convention was not specifically implemented.)

"The United States has also entered into other international agreements designed to repress antisocial conduct, such as the white-slave traffic, traffic in and manufacture

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constitutions and laws for the protection of individual rights are not adequate or are being so administered as to stigmatize us with the commission of the crime of genocide while under the same convention the accusing governments may not be charged with genocide in its true sense. I would like to see the United States Government take the leadership in proposing the outlawry of genocide when committed by governments as a matter of policy or by their connivance or acquiescence. I would also like to see included in the same convention, a commitment by the signatories to prevent and punish that kind of genocide within their territories whether committed by public officials, private individuals, or groups of individuals.

"The crux of the criticism of the convention now before the Senate is the definition of genocide contained in article II. The first paragraph of that article reads: 'In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.' Article IV limits the application of the convention to persons committing genocide. We are accordingly at the outset met with a bar against accusing governments, totalitarian or otherwise, of genocide. In this respect the convention is a departure from the approach to the crime of genocide with which the United States Government started the negotiations which led to the signature of the convention. As will be seen from the proceedings of the Economic and Social Council of the United Nations, the representative of the United States insisted that genocide could not exist except with a governmental approval, connivance, or acquiescence. For reasons best known to our own Government officials, this approach was later abandoned and we are now presented with a convention dependent, for its efficacy upon the punishment of individuals in national courts.

"Furthermore, the convention provides that these acts of individuals shall be committed with intent to destroy a protected group 'in whole or in part.' The question immediately arises, Is the killing by an individual of one or two members of a group with intent to destroy those members as part of the group, regarded as genocide? In order to meet this difficulty, some of the proponents of the convention now seek to escape it by arguing that the intention must be to destroy the whole group. This is equally untenable. How could an individual or group of private individuals undertake to destroy a whole national, racial, ethnical, or religious group within the country without governmental approval, connivance, or acquiescence?

"Moreover, article II enumerates a series of acts of genocide, including 'mental harm to members of the group.' Can it be successfully denied that segregation laws are susceptible of being denounced as causing mental harm to all members of the group against which such laws discriminate? Minority groups in this country are now vigorously seeking to have such discrimination abolished by Federal legislation. Can there be any reasonable doubt that if Congress fails to enact the civil-rights laws now being urged upon it and if this convention is ratified as submitted, members of the affected groups will be in a position to seek legal relief on the ground that this so-called Genocide Convention has superseded all obnoxious State legislation?

"The nonapplicability of the convention to crimes of genocide now being committed by totalitarian governments behind the iron curtain is further emphasized by the requirement of article II that acts of genocide can be committed only against a national, ethnical, racial, or religious group, as such. The inhuman treatment now being administered to members of these groups behind the iron curtain is said to be, not because they belong to any of the groups protected by the Genocide Convention, but because they are enemies of the state or dangerous to its security. The omission of political groups from the definition of genocide in the convention has made this evasion possible. The original resolution on genocide of the General Assembly of the United Nations dated December 11, 1946, included the protection of political groups but such groups were omitted from the convention as it is now before the Senate. The effect of this omission and of the nonapplicability of the convention to governmental acts was shown in a letter sent to the Secretary General of the United Nations in September 1949, by the American Jewish League against Communism, protesting against the deportation of 400,000 Jews from the Ukraine and White Russia to Archangel and Siberia because they were considered too prodemocratic to be left on the Soviet borders in case of war. The futility of the convention to offer any protection against such cases of real genocide is further substantiated by the report that Russia is carrying out the mass deportation of Greeks and other non-Russians from the Caucasas area. Moreover, about 24,000 persons have died in the Buchenwald concentration camp since it has been operated by the Soviets for political prisoners.

"Of what avail to any of these poor unfortunate people will be this convention on genocide under which the only possible effective sanction will be the punishment of individuals by national courts? What can a national court in a country behind the iron curtain do to prevent genocide as defined in this convention? What real protection could the court of any country provide if an independent judiciary does not exist?

"It is argued that the ratification of this convention as submitted will aid the Government's policy in the cold war. As pointed out, the Communist world has already won its cold war against the western powers with respect to the punishment of genocide. The convention as submitted could not be more perfectly drafted to enable the

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of narcotic drugs, and the traffic in arms.

"Thus, the United States has cooperated in the past with other nations in the suppression of such lesser offenses as the killing of fur seals. It is natural that other nations look to the United States for cooperation in the suppression of the most heinous offense of all, the destruction of human groups.

"It is an inescapable fact that other nations of the world expect the United States to assert moral leadership in international affairs. The United States has a record of humanitarian diplomacy, beginning with the early days of the Republic when President John Quincy Adams expressed the public sympathies of the American people with the Greeks in their struggle for independence from Turkish rule. The United States Government has remonstrated more than once with other governments regarding their persecution of the Jews: with Rumania in 1902 and and with Tzarist Russia in 1891 and 1904. In addition, the United States has also intervened diplomatically with other governments for the protection of Christians, not only on behalf of American missionaries but also on behalf of converts. For example, it is interesting to note that in the treaty of October 8, 1903, between China and the United States, the Chinese Government specifically agreed not to persecute teachers of Christian doctrine nor to molest Chinese converts in the peaceable practices of Christianity. This Government has also intervened diplomatically on behalf of native Christians, in the case of the Armenian population of Turkey.

"Finally, it should be recalled that the United States intervened in Cuba in 1898, in the cause of humanity and to put an end, to quote the joint resolution of April 20, 1898, to 'the abhorrent conditions which have existed for more than 3 years in the island of Cuba * * * have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization * * *'

"It is a familiar role, therefore, for the United States to take the lead in raising moral standards of international society. And, prevailing international conditions make it imperative that the United States continue to play this role. We all know too well that millions of human beings are still subjected to the domination of ruthless totalitarian regimes, and that the specter of genocide still haunts mankind. It should be made clear to such governments that the United States and other civilized countries do not condone such conduct now any more than in the past.

"The United States took a leading part in the United Nations in the international effort to outlaw this shocking crime of genocide. I can only express, on behalf of the State Department, our earnest hope that the Senate of the United States, by giving its advice and consent to the ratification of this convention, will demonstrate to the rest of the world that the United States is determined to maintain its moral leadership in international affairs, and to participate in the development of international law on the basis of human justice.

"In conclusion, there will be some criticisms offered on this convention, first on the ground that it is too bold and then on the ground that it is too tender. We believe that it is of the utmost importance to our foreign relations to be bold about the principles involved in this proposed convention. We have tried to put it on rational, reasonable, and solid constitutional grounds, and we believe that the convention is solidly founded. But here in the twentieth century we have found a revival not only of man's ability to destroy himself in great numbers through ordinary violence, but a revival as a matter of policy of the principle of destroying large groups of our fellow humans, and if the history of the twentieth century is to record that that policy of degeneration has occurred, we would also like to see that the history of the twentieth century records that the United States took an active, early, and immediate leadership to try to stop that sort of thing.

"Also we are engaged in a very fundamental struggle in our foreign relations between the forces that are trying to build up a free world and the forces that are trying to tear it down. We have committed considerable material resources to that struggle. The attempt to build is a difficult attempt. It is not easy to get an economic system in order or to get an international collective security system in order. It is fairly easy to tear it down. On the physical side the odds are strongly against us. The bridge which cost $1,000,000 in Greece was destroyed by a $25 bomb.

"We are in this fight against enormous odds on the physical side because of the nature of the opposition and the opportunities being offered to the opposition for destruction. We therefore must turn to the field in which we have enormous advantages, that is, to the moral, political, and spiritual field, in order to mobilize mankind around these basic measures of freedom and try to offset, thereby, some of the disadvantages on the physical side.

"Therefore we look upon this Genocide Convention as a major element in the attempt to mobilize the moral and spiritual resources of mankind in the interest of our common objectives as written in the United Nations, and we believe that if we can offer this leadership we will see a continuing consolidation of mankind behind these principles and through that contribute greatly to the interest, the peace, and the well-being of the American people."

* * *

by SHAD POLIER

This is part of a statement submitted by Mr. Polier, representative of the American Jewish Congress, to the Senate Foreign Relations Committee during its genocide hearings, January, 1950. (*Continued on page* 309)

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totalitarian governments to proceed against their minority groups the same as Hitler did. The convention is supposed to implement the Charter of the United Nations which requires the members to promote universal respect for and observance of human rights and fundamental freedoms. The convention will actually weaken the protection now provided in the Charter.

"Also, it is argued that the ratification of the convention will prevent future war criminals from pleading, as they did at Nuremberg, that there was no law on the subject of genocide. This argument is one of despair. The purpose of the Genocide Convention is to assist in preventing future war. If its effect is not to be felt until after another world war has been fought and won, then, I submit, we are wasting our time in discussing it.

"As previously pointed out, it is argued that the convention will have no application to the United States because genocide has never been committed in this country and it is hoped never will be. In view of the patent futility of the convention to prevent the mass destruction of peoples in countries with totalitarian governments, if the convention has no real application to the United States, as asserted, no reason remains why the Senate should run the risk of having the convention interpreted, if not by us then by one or more of the other contracting powers, as being applicable to domestic questions in the United States.

"In former years it was the practice of American delegates to international conferences to decline to sign international conventions which would or might require the Federal Government to assume responsibility for matters falling within the jurisdiction of States of the Union, or to attach appropriate reservations safeguarding the rights of the States. I refer particularly to the code of private international law adopted in treaty form by the Sixth International Conference of American States held at Habana early in 1928. This treaty contains international commitments on many phases of law and procedure affecting the private lives of the people. It covers such matters as marriage and divorce, real and personal property rights, contracts, wills, negotiable instruments, sales, penal law, and many other subjects. As to that convention, the delegation of the United States 'found it impossible to vote on the code and thereby treat of questions which were of a domestic character and pertained to the jurisdiction of the 48 States, which had their special internal regulations on these matters.'

"The Genocide Convention is the beginning of a series of treaties which the Senate will have to consider involving wider participation by the United States in international cooperation. No attempt has been made in this treaty to safeguard the jurisdiction of the States over commonlaw crimes and civil responsibility resulting therefrom where such crimes may also constitute genocide under this convention. In that respect I regard the Genocide Convention as a further attempt on the part of the Federal Government to increase its power at the expense of the States."

* * *

by WILLIAM H. FITZPATRICK

Following is part of an address made to the Young Men's Business Club, New Orleans, La., on July 12, 1950. *Mr. Fitzpatrick is editor of the* NEW ORLEANS STATES.

"THE UNITED STATES Constitution provides that the President, by and with the consent of the United States Senate, has the power to enter into treaties with foreign nations. If two-thirds of the Senate—present when the treaty comes to a vote, mind you, not necessarily two-thirds of the entire membership—votes to ratify a treaty, that treaty becomes the supreme law of the land, standing four-square with the United States Constitution where it does not conflict and standing equal with legislation passed by the National Congress.

"At the same time all treaties supersede State laws, and all State constitutions, and all city and county and municipal law.

"In other words, the President and Senate alone can act to repeal any State laws through the device of treaty enactment.

"There is at present before the United States Senate such a treaty. It is called the Genocide Convention. If our Senate ratifies this treaty as it is written, it will nullify many State laws. I think all of you will agree that repeal of any State laws passed by State legislatures presumably close to the people they represent, ought not be repealed by means of a treaty conceived in the United Nations, no matter how worthy its conception.

"For my part I think that the United States Constitution has provided us with a pretty fair set of governmental processes. Under it there are restraints placed upon the Executive in the form of the Congress; there are restraints placed upon the Congress in the shape of the Supreme Court, and there are restraints placed upon the Supreme Court in the Constitution itself.

"The seeds of all our freedoms are in that Constitution. The many safeguards in it make any major changes in governmental processes necessarily slow. That is all to the good. It means that nothing is so immediate, no problems of government so great, that hasty legislation can be embodied in our national law and be assured of staying there to the later detriment, perhaps of all our people. I have in mind President Truman's thoughtless suggestion during 1946, that he be given powers to draft all striking railroad men and union officials into the Army. This bill passed the House unanimously. But to the credit of Sena-

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"RECENTLY, considerable distress has been occasioned in some quarters by the failure of a reputable organization, the American Bar Association, to endorse the Genocide Convention when it was debated before its house of delegates. Although representing, it is believed, a minority view on this issue, the American Bar Association enjoys generally a position of high standing and authority. Its contentions must therefore be answered.

"The main criticism leveled at the convention by its opponents is that it fails to consider Federal constitutional requirements.

"We submit, however, that ample authority exists for the United States to enter into the Genocide Convention and for Congress to enact the necessary penal legislation. Constitutional provisions relevant to the treaty power are article II, section 2, granting the President the power to make treaties when there is concurrent Senate ratification; article VI, providing that the Constitution, laws, and treaties made under the authority of the United States shall be the 'supreme law of the land'; article III, section 2, conferring jurisdiction upon the Supreme Court to consider cases arising under our treaties; and finally article I, section 10, forbidding the States to enter into treaties.

"These provisions have traditionally been construed by the courts as conferring a distinct, substantive grant of power upon the Federal Government. In not a single case has the exercise of this power ever been held excessive. The Supreme Court has clearly stated that treaties would be struck down only when they abrogate basic constitutional guaranties.

"The Supreme Court has also suggested that the treaty power is not subject to the same restrictions as are acts of Congress. It stated: 'It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could.'

"In the light of these holdings, it is clear that the Genocide Convention intends no unconstitutional purpose. No one denies that genocide is a matter which requires international measures of cooperation. Under the cases outlined above, the Federal Government therefore has a virtually unlimited power to enter into treaty arrangements affecting its control. Pursuant to this treaty, Congress will be empowered to enact legislation sufficient in extent to enable this country to fulfill its treaty commitments, and under article VI of the Constitution such treaties become the 'supreme law of the land,' superseding any State laws with which they may be in conflict. There is nothing in the slightest which is either unusual, unconstitutional, or disturbing about this procedure. Certainly it works no 'tremendous change' in the structure of State-Federal relationships. On the contrary, this is the normal and inevitable result whenever this country undertakes to become a party to any international agreement.

"In considering any convention, the United States is always confronted with an identical choice: Either participation in international acts is sufficiently important to warrant partial invasion of the usual precincts of the States or it is not. If usual State prerogatives are made our primary concern, then the Federal Government is disabled from all international action dealing with matters presently within the jurisdiction of the States. But this is not a matter running to the constitutionality or unconstitutionality of any act. It relates only to an evaluation of the importance of each of the elements affected. With reference to the Genocide Convention, we can discern no serious loss—indeed no real loss of any kind—which would accrue to the States by its adoption, and we are cognizant of the great advantages to the entire world community which will flow from its ratification.

"Finally, it is an obvious overstatement to describe the Genocide Convention as embracing a 'great field of criminal jurisprudence.' Spokesmen for the bar association position have admitted during debates on the convention that this country is not now engaged in genocide nor have we ever been so engaged. And it is unlikely that we shall undertake action of this character in the foreseeable future. Prosecutions in the United States under the Genocide Convention will undoubtedly be exceedingly rare. These rare cases can hardly be regarded as imposing serious strains on Federal-State relationships. Instances of genocide assuredly will occur less often than violations of the conventions on traffic in slaves or opium, both of which have long been adhered to by the United States without causing any marked changes in the distribution of power between the States and the Federal Government.

"The second argument advanced in opposition to the convention is that it will require and make mandatory American participation in an international penal court. This assertion is not supported by anything to be found in any of the provisions of the convention. Article VI of the convention expressly stipulates that persons charged with genocide shall be tried by a competent tribunal of the State in which the act was committed or by an international penal tribunal only 'with respect to those contracting parties which shall have accepted its jurisdiction.' There is nothing in the convention which makes acceptance of such jurisdiction obligatory or which in any way commits States ratifying the convention to participate in such a tribunal should it one day be established.

"As a practical matter, there is at the present time not even a draft for such a tribunal, and no one now has any definite information as to its organization or structure or as to the possible extent of its jurisdiction. At the time that such a court is in fact proposed, this country by open debate and by full consideration of its merits will then be able to make a considered and informed judgment as to whether or not to agree to its jurisdiction. Ratification of

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tor Taft, the so-called labor baiter, it was held up in the Senate. I think all of us will agree in retrospect that that was hasty legislation, calculated to do the Nation harm, and that even if the Congress had passed it and Mr. Truman signed it that the Supreme Court would have found it unconstitutional.

"The Genocide Convention is the outgrowth of an international revulsion at the mass executions perpetrated on helpless people by Hitler.

"To understand the problem completely, we must know what is being attempted. Just what is genocide? No one had ever heard the word until comparatively recently. It means race killing.

"It goes without saying that no decent person can quarrel with the announced objectives of this convention —the outlawing of mass murder of a racial, religious, or ethnical group. The very word Buchenwald will live forever as a measure of the depths of mankind's degradation. And we might add Hiroshima, too. But let's look at this genocide convention.

"Article I of the convention says:

"'The contracting parties confirm that genocide, whether committed in time of peace or time of war, is a crime under international law which they undertake to prevent and to punish.'

"The nations which ratify this convention undertake these solemn duties:

"To prevent genocide.

"And to punish genocide.

"We will be bound to prevent it and to punish it wherever it may appear in the world.

"There are no constitutional restrictions on the power and duty of the President in executing this obligation. If it is ratified as a treaty it becomes the law of the land.

"Where does this obligation begin and where does it end?

"As we all know, the Northern Korean Communists attacked without warning and without reason the Republic of South Korea. That is a war between one sovereign nation and a Russian satellite. We have to stop that sort of thing.

"But would we be willing to commit American lives to stop a religious war between Shintoists and Buddhists in Korea if it should have occurred? Were you willing to send American troops to India to stop the warfare between Moslem and Hindu? Were you willing to send Americans abroad to stop the race riots in South Africa between natives and Indians? Are we to be committed to release of slave labor in Russia? To action against religious persecution in Russia's satellite countries?

"We will be committed to these things should we ratify this Genocide Convention.

"A year ago last March, the *States* printed a series of editorials on the Universal Declaration of Human Rights.

"We warned last year that the declaration, no matter in what guise it was clothed, was dangerous to our Constitution and Bill of Rights. We didn't think it would be used to nullify State law so soon.

"But it has happened already in California. In a recent case there, a three-judge district court of appeal has declared the alien land law of California invalid because of the universal declaration of human rights and the United Nations Charter.

"The law in question was passed in 1920 and forbade the acquisition of property in California by aliens ineligible for citizenship.

"The merits or demerits of the alien land law are not our concern. It was a California State statute. But what is of concern to all of us in every State was the reasoning of the three-judge court.

"The court held that because we are signatories to the United Nations Charter, the Charter superseded the State law. The court held this opinion despite paragraph 7 of article 2 which plainly states:

"'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter * * *.'

"But the court reasons that the universal declaration of human rights implements and emphasizes the purposes and aims of the UN and its Charter and that the declaration affirms that 'all human beings are born free and equal in dignity and rights. They should act toward one another in a spirit of brotherhood; everyone is entitled to all of the rights and freedoms set forth in this declaration, without distinction of any kind such as race, color, sex, language, religion, political, or other opinion, national or social, origin, property, birth or other status' and that 'everyone has the right to own property alone as well as in association with others.'

"If this decision is affirmed, the effect will be far-reaching, more so than any of the critics of the declaration or the Charter ever dreamed. It will furnish a treaty basis without need of any other constitutional sanction for invalidation of State laws.

"And since a valid treaty also supersedes existing Federal law, what will happen to our immigration and naturalization laws if this California ruling is upheld by the United States Supreme Court? The declaration says everyone has the right to seek and enjoy in other countries asylum from persecution.

"The top 11 Communists were convicted of plotting violent overthrow of the Government in New York last year. What effect will this California ruling have in the future? The California court held that everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind such as * * * political or other opinion. (*Continued on page* 312)

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the Genocide Convention cannot prejudice this freedom of action in the future. In order to allay any remaining fears, an express reservation to this effect could be included in Senate ratification.

"It is also argued by some that ratification of the convention constitutes approval 'in principle' of an international penal court. As we have indicated above, we do not believe this to be true. But, even if it were, the United States has already not only approved of the principle of international penal courts but, at Nuremberg and Tokyo, has already actually participated in their operation.

"The American Bar Association also alleges that article III (c) of the convention making punishable any 'Direct and public incitement to commit genocide' constitutes an infringement of the constitutional guaranty of free speech. This allegation overlooks or misinterprets a whole field of American law. The Genocide Convention proposes no new abridgement of the right of freedom of expression. Neither in the United States nor anywhere else in the world is there absolutely unrestrained freedom of speech. Incitement has a well-defined meaning in American law and in numerous instances has been made a punishable offense. Incitement to riot, to murder of officials, to mutiny and to other criminal acts, has long been regarded as criminal and in itself subject to penalty. The convention seeks only to apply these same principles to acts of genocide. In its present version the Genocide Convention by no means represents the extreme view. Originally efforts were made within the United Nations to outlaw all incitement to genocide. The compromise finally effected was that criminal responsibility would attach only to public and direct incitement.

"The American Bar Association recognizes that acts of genocide are contrary to the moral law and abhorrent to all who have a proper and decent regard for the dignity of human beings. It would be foolhardy to permit those who incite to the commission of these odious and indefensible acts to evade responsibility.

"It is further argued by critics of the convention that by ratifying the convention this country would be placed in a peculiarly exposed position. It is claimed that since our Constitution causes treaties to become effective upon ratification, the provisions of the Genocide Convention will become the domestic law of the United States before being implemented in other countries. Again, this objection is is unsound. Ratification of the Genocide Convention could in no way involve unilateral action by the United States. By its terms the convention remains inoperative until it has been ratified by the governments of at least 20 states.

"Finally, it is not true that the convention would become domestic law capable of imposing punishment upon nationals of the United States for its infraction as soon as ratification is completed. By its own terms, the Genocide Convention is not self-executing. Article V provides that 'the contracting parties undertake in accordance with their respective constitutions to enact the necessary legislation to give effect to the provisions of the present convention * * *.' Thus, specific legislation in addition to ratification is necessary to put the convention into effect. It would be impossible for penalties to be affixed in the absence of such supplementary legislation.

"Still other opponents of the convention have expressed apprehension that the convention will require affirmative action of the United States to prevent or suppress genocide wherever it appears in the world. The terms of the convention fail to disclose any tenable basis for these fears. The convention obligates contracting parties to prevent and punish genocide only in their own territory. With reference to acts of genocide perpetrated in other states, the contracting parties are authorized under article VIII of the convention only to call upon the competent organs of the United Nations to take appropriate action under the Charter of the United Nations. No country is required, nor is it permitted, to take unilateral action to punish or restrain acts of genocide committed in a foreign territory. The narrowness of the application of article VIII is perhaps best illustrated by the fact that in the sixth committee of the United Nations, charged with drafting the convention, this article was provisionally deleted on the ground that it did not comprise anything not already contained in the United Nations Charter.

"It is claimed that the Genocide Convention will be invoked against lynchings and against racial segregation within the United States and that the convention will therefore permit international agencies to meddle in problems which are peculiarly domestic.

"These arguments are founded upon a complete misconception of the intended scope of the convention. Under the convention definition of genocide contained in article II, to constitute the crime an act must be coupled with a specific 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.' This definition of intent will not markedly affect American institutional patterns. As was noted in the Yale Law Journal:

" 'Where the requisite intent is lacking, acts of violence might constitute murder or assault, but they could never constitute the crime as defined in the convention. In a lynching, for example, while the participating individuals might be tried for murder, or for conspiracy to commit murder, they could never be tried for genocide unless the requisite intent accompanied commission of the act. Similarly, racial segregation could not constitute the crime, unless joined with intent to destroy the segregated group. Only segregation with purposes similar to those motivating Nazi use of concentration and labor camps would violate the treaty agreement. Drafted as the con-

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"What happens when that political opinion includes a belief in the right to overthrow the Government by force?

"Remember, please, that we have not even ratified any such human rights covenant. And despite Mrs. Roosevelt's assurances that it was not a statement of law or legal obligation, the California court so holds it.

"In what case will we find ourselves should the Senate ratify the genocide convention?

"It not only invades domestic law, it provides for the extradition of Americans for overseas trials should they be accused of having committed genocide in any other country. And proponents of the convention plan an international tribunal to try all Americans overseas, wherever the international court of justice might be sitting, for offenses which might have been committed in his own home. Will the safeguards surrounding accused Americans in this country be found in those trials? Or should we stop and take a long look at these proposals before we accept them as the law of the land?

"I am against enactment of State and county and city and town legislation by the United Nations, no matter for what laudable purposes. It violates our legislative processes; it attempts to bypass our structure of government.

"As I said before, the Constitution we live under is a wonderful document. It is not a static thing; it is a living, breathing way of life which is flexible enough to keep step with advancement and development of our people, even unto the welfare state or outright totalitarianism. The Constitution provides for charges—provided the people who live under it want changes.

"The important decision before us in this Genocide Convention is whether we should not allow the United Nations to write domestic law through international treaties into our State and county laws.

"What is the necessity of electing Representatives to the United States Congress every 2 years if, by action of a President's endorsement, and a two-thirds vote in the Senate, we can derogate or nullify statutes on the books or write new legislation, conceived in the United Nations, decided in the International Court of Justice in The Hague, and enforced in New Orleans?

"It is a long step in the path to world government. Do Americans want, or are they ready for, world government?

"It may be the only way to peace in the final analysis. But if we embark on that program, the American people ought to know about, and ought to agree to it and not be blindly led into it.

"And that is what government by treaty will do, sooner or later. And in the turmoil of compromise, how many of our freedoms and rights will be given up so we can meet upon the common ground of legal, moral, and political mediocrity of so many of the other nations is something no one can foretell. Government by treaty is a dangerous approach, and if we wish to retain our freedom, and maintain our American concept of government, we have got to abandon that approach."

* * *

by ORIE L. PHILLIPS

This is the major part of an article appearing in the JOURNAL *of the American Bar Association for August,* 1949. *Mr. Phillips is chief judge, U. S. Tenth Circuit Court of Appeals.*

"ON JUNE 16, 1949, the President transmitted to the Senate the Convention on Genocide with the request that the Senate give its advice and consent to its ratification.

"By this Treaty the contracting parties confirm that genocide is, 'A crime under international law which they undertake to prevent and punish.'

"Thus, it will be seen that it is proposed by the action of the President, consented to by two-thirds of the Senators present when Senate action is taken, to define certain acts, which have traditionally been regarded as domestic crimes, as international crimes and to obligate the United States to provide for their punishment and for the trial of persons accused thereof either in our domestic courts or in an international tribunal.

"It would seem appropriate, therefore, to review the treaty-making power.

"Section 2 of Article II of the United States Constitution authorizes the President by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur.

"The power is not one granted by the States. Neither did the powers of external sovereignty depend on the affirmative grants of the Constitution. If they had not been mentioned in the Constitution, they would have vested in the Federal Government as necessary concomitants of nationality. They embrace all the powers of government necessary to maintain an effective control of international relations.

" '. . . the external powers of the United States are to be exercised without regard to State laws or policies.'

" '. . . the field which affects international relations is "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.'

"The treaty-making power is not limited by any express provision in the Constitution. But it does not authorize what the Constitution forbids and its exercise must not be inconsistent with the nature of our Government and the relation between the States and the United States.

"The treaty-making power is not subject to the limitations imposed by the Constitution on the power of Con-

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vention is, its application in America would be largely limited to suppression of future brown shirt movements, if and when such groups were to employ genocidal measures in attaining their ends.'

"Article II does include an intent to destroy a group in part as falling within the definition of genocide but we must not misunderstand the textual significance of these words. Historically, no group has ever been totally exterminated by acts of genocide. To insure that the chance survival of some portion of a group would not permit the perpetrators of mass murder to evade responsibility, the framers of the convention were careful to define acts of genocide so as to include the destruction of a group in whole or in part. It is clear from the debates which preceded adoption of this provision that the words 'in part' intended to denote a substantial portion of a group and that the oppression of particular individuals was not within their contemplation."

* * *

by LEV E. DOBRIANSKY

Following are extracts from testimony given the Senate Foreign Relations Committee, February 9, 1950. Mr. Dobriansky is professor of economics, Georgetown University, and president of the Ukrainian Congress Committee of America.

"**IT IS CERTAINLY NOT** my aim here to dwell on moral platitudes, sentimental and lofty generalities, or legalistic abstractions which, such as have been advanced in these hearings, reek with the fallacy of misplaced concreteness. My consuming purpose is to direct your thoughtful attention to the array of cold, concrete facts and evidence in the case, so that the essential meaning of genocide, as it applies notably to a nation, will be rendered crystal clear.

"In like manner that expansive Russianism under the czars is historically continuous in the territorial extension of Russian Soviet communism, the many instances of genocidal practice of the former also serve as indisputable precedents establishing a line of continuity leading to contemporary Soviet genocide. Extremely naive is the thought that a nation can transform itself overnight by simply passing through a revolution.

"It is of particular significance that the Russian Communist Party, soon after the establishment of its dictatorship, ordered the popular glorification of such wanton genocidists as Ivan the Terrible and Peter I, and in this past war Stalin appropriately crowned this Genghis Khan tradition by decreeing the Suvorov decoration as the highest military award.

"The Russian Communists lost no time in utilizing genocide as an efficient instrument in their political strategy of conquest over non-Russian territories. Let us examine the record of the national victims of Soviet genocide.

"(1) The Ingerian nation, which consisted of 400,000 highly civilized people of Scandinavian culture and who inhabited Ingermanland, was completely wiped out in 1921-23, accommodating thereby the Russification of this hinterland of Leningrad;

"(2) The Don and Kuban Cossack nations, people who considered themselves separate national groups and aspired to independence, were annihilated between 1928 and 1930;

"(3) The Greek population of the climatically warm Kerch Peninsula, an ethnic group of some 8,000 people, were deported to a forced labor camp in the insufferably cold Arctic in order to allow the Russification of this strategically important region;

"(4) The Volga German Republic was abolished in 1940 and a population of approximately 800,000 was deported permanently to the Arctic area;

"(5) The Crimean Tartar Republic was erased from the map in 1944, with some 700,000 improperly clothed humans likewise cattled to the Asiatic Arctic, most of them having died along the route from climatic exposure;

"(6) The Chechen-Ingush Republic of the Caucasus met a similar fate in 1945 and a deportation of 600,000 to Asia ensued;

"(7) The 'autonomous region' of Karachev was liquidated in 1945, and its population ruthlessly scattered; and

"(8) The Baltic nations of Lithuania, Latvia, and Estonia, for whom there are able and free spokesmen with substantial evidence certifying to current Soviet genocide, may by virtue of their relatively small populations end in complete extinction. However, they are still in the stage of genocide where the destruction of a nation in select part and therefore as such is achieved.

"What the non-Russian nations in the Soviet Union have been and are experiencing, what those in the Soviet political orbit are now beginning to experience, and what others, like China, have in immediate prospect, relative to the destruction of a nation in select part and therefore as such, is best portrayed by the application of Soviet genocide to the Ukrainian nation.

"Let us therefore observe these systematic steps of Soviet genocide.

"(1) The initial attack is directed against the cerebrum of the national organism, against its intelligentsia, its guiding leaders, and brilliant personalities: in short, a deadening mass blow on the head of a nation so to paralyze its entire body. In the years of 1920, 1926, 1930-33, this attack was undertaken by the Kremlin to destroy the mental fibers of the Ukrainian nation. Eastern Ukrainian intellectuals were liquidated or deported to certain death in Siberia en masse. In 1931 alone, 51,712 Ukrainian intellectuals were deported to Siberia. Even leading Ukrain-

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gress to enact legislation, and treaties may be made which affect rights under the control of the States.

"A treaty, entered into in accordance with constitutional requirements, to the extent that it is self-executing, has the force and effect of a legislative enactment and to all intents and purposes is the equivalent of an Act of Congress. In addition to being an international contract, it becomes municipal law of the United States and of each of the States, and the judges of every State are bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

"In the event of a conflict between a treaty made in accordance with constitutional requirements and the provisions of a State constitution or a State statute, whether enacted prior or subsequently to the making of the treaty, the treaty will control.

"But, a treaty may be abrogated by the enactment of a subsequent Federal statute which is clearly inconsistent there with.

"Thus, it will be seen that it is proposed that we set out on a course, under a power without express limitation and of broad scope, to enact domestic criminal law, without any concurrence by the House of Representatives, the body traditionally regarded as closest to the people.

"Moreover, if the offenses involved should be regarded as international in character by Section 8 of Article I of the United States Constitution, Congress has the power 'to define and punish . . . offenses against the law of nations.'

"Since the Convention in most respects is self-executing, in those respects, on ratification, it would become the supreme law of the land. That would not be true as to any other contracting party except France and a few other states. Even if non-self-executing, the obligation to implement the Treaty by legislation is as binding as the Treaty itself.

"It is one of our fundamental concepts that a legislative body, in the exercise of its power to declare what constitutes a crime, must define it so as to inform persons subject thereto, with reasonable precision, what it intends to prohibit so they may have a certain and understandable rule of conduct and know what it is their duty to avoid. 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'

"Do the definitions in Articles II and III of the Convention meet that test?

"What is a part of a national, ethnical, racial or religious group—one member, two members, how many?

"If an act was done with intent to destroy two members of a group, although actuated by no malice toward the group as such, would that be genocide?

"Would it not be more accurate and desirable if the prerequisite intent was defined as an act committed with intent to injure one of the enumerated groups as such, so as to make it clear the act must be directed toward the group as such and not merely at an individual member or members thereof?

"What is meant by mental harm?

"Does not complicity mean the act of an accessory, or to aid, abet, assist, or incite genocide?

"A person accused of an offense defined by the Convention, if tried by an international penal tribunal, would not be surrounded by the safeguards we accord persons charged with domestic crimes.

"In the event we ratify the Convention, should we, by reservation, expressly provide that citizens of the United States and persons within the territorial jurisdiction of the United States, charged with an offense defined in the Convention, will be subject to trial and sentence only by a competent judicial tribunal of, and sitting within, the United States, vested with jurisdiction over such offense by Federal legislation; that a citizen or other person so charged shall be presumed to be innocent until his guilt has been established by lawful evidence beyond a reasonable doubt; that a citizen or other person so charged shall be protected by all the safeguards embraced within the Constitution of the United States, including the rights guaranteed by the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution of the United States, to an accused charged with a domestic crime; and that such citizen or other person shall not be subject to be charged, tried, or sentenced by any international penal tribunal? Of course, no international penal tribunal has yet been created, and the advice and consent of the Senate would be necessary to subject our citizens to the jurisdiction of such a tribunal should it be created. But should we not endeavor to close the door to the giving of that advice and consent in the future?

"Although the United Nations Charter provides that nothing therein contained shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, since our representatives have participated in the drafting and approving of the Genocide Convention, if it should thereafter be ratified by the United States, would the matters embraced in such Convention be thereby withdrawn from our domestic jurisdiction?

"Should we agree to submit to the International Court of Justice a dispute as to the interpretation, application, or fulfillment of the Convention by us? Suppose a citizen of the United States was charged with one of the offenses defined in the Convention—the group involved being an alien racial group—and tried in a competent tribunal in the United States, and our domestic courts, including the Supreme Court of the United States, should hold the act

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ian Communists were murdered or committed suicide to protest Moscow's policy of national genocide. When the Soviets occupied Western Ukraine in 1939, then part of Poland, this initial step was repeated. It is most significant that the political and intellectual leadership in Ukraine today is conspicuously Russian.

"(2) The second attack, usually in part concurrent with the first, is aimed at the soul of the nation, against the churches, their hierarchy and priests. Between 1926 and 1932, the Ukrainian Orthodox Church, with about 10,000 lay and monastic clergy, was thoroughly liquidated. In 1945, when the Soviets established themselves in western Ukraine and in Carpatho-Ukraine, the Ukrainian Catholic Church was similarly annihilated. Thus, even before the cases of Stepinac Mindszenty and Beran emerged, the extreme case of Metropolitan Joseph Slipyj and the entire loyal Catholic hierarchy and clergy, who were deported for certain death or outrightly murdered, was a closed chapter.

"(3) The third attack is canalized against the conserving organs of the nation's body, against the tillers of the soil, the farmers, the large peasantry which conserves the traditions, the folk music and literature, and the distinct language of the nation. By exterminating this select part of the nation, the ethnographical territory of the nation is sufficiently disrupted to prepare the way for the fourth and last step in this process of methodical genocide. The unprecedented man-made famine of 1932-33 in Soviet Ukraine, which resulted in the forced starvation of up to 5,000,000 Ukrainians serves as the classic model of this type of attack. One of the most naive ideas circulating abroad is that this was merely an economic phenomenon of Communist liquidation of a social class, 'the kulaks.' The outstanding facts are that there were relatively few large-scale farmers in Ukraine, that during the NEP policy the Ukrainian peasantry, the main social source from which most prominent Ukrainian intellectuals emerged, became the major force in the preservation of the Ukrainian national idea.

"(4) The fourth and last step is the systematic settlement of Russians or Asiatic tribesmen in the disrupted area in order to mix up the nationality in question and thus create a mixed ethnic territory. This obviously follows the full performance of genocide on a nation in select part and therefore as such. In the statistical report referred to, it will be observed that whereas, according to the 1926 Soviet census, the total population of Soviet Ukraine was 29,000,000, of which Ukrainians made up 23,200,000, or 80 percent and others 5,800,000, or 20 percent, in the 1939 Soviet census, the total population of Soviet Ukraine is set at 31,000,000, consisting of 19,600,000 Ukrainians, or 63.2 percent, and of others, 11,400,000, or 36.8 percent of the total. It should be noted, too, that the total increase over these 13 years was barely over 1,000,000 in a country which prior to World War I occupied the foremost place, not only in Europe, but in the world, with respect to its natural increase of population, about 800,000 a year. It is noteworthy that since 1939, the Soviets have for obvious reasons drawn down a statistical iron curtain.

"Against the background of this mass Ukrainian experience with calculated Soviet genocide, the chief arguments opposing the ratification of the Genocide Convention appear by sheer contrast outstanding for their utter confusion, their flagrant naiveté, and, I regret to say, for their inadvertent apology of Soviet genocide practice.

"Let us briefly review them:

"(1) That the convention does not apply to the peoples behind the iron curtain. If this is so, then it absurdly reduces itself to applying to no people anywhere, at any time. The whole intent, the wording, and the objective of the convention are unmistakably aimed at the prevention of the very genocidal acts recited here, by outlawing such mass murders and biological destruction. Indeed, the living monuments of Soviet genocide and tyranny are the millions of displaced persons scattered about the free world today.

"(2) That the convention limits the commission of crime to private persons. This logically desperate argument is bluntly contradicted by an unsophistical reading of article IV, which, in its obvious reference to state or governmental function, aims at any unambiguous fixation of responsibility for such crime on specific persons. The omnipotent power of the state, in the eyes of some, will therefore be unable to serve as a shield of justification for such criminal acts, as article IX specifically provides for responsibility of states for acts of genocide.

"(3) That the convention is limited as to reasons. This is patently untrue. Reasons for criminal acts or motivation in genocide are not limited by the convention. Aside from situations of reasonable self-preservation and the like, in the manner that criminal homocide is established when one kills a human being qua human being, whether for money, love, grudge, and so forth, criminal genocide is established when one nation or state destroys another as a nation, whether for economic, strategic, religious, or political reasons. In the case of the Soviets, every genocidal act, as indeed any act, is political in nature, and anyone who opposes it, is by definition, 'an enemy of the state.'

"(4) That the convention is of no value. It is a logical truth that where objects are not properly understood, no value can be assigned to them. We are not obtuse to think that the Genocide Convention will, under current conditions, effectually resolve this vicious issue of genocide, but we possess at least that requisite vision and perspective to appreciate its significance as a vital step in the right and necessary direction. Its specific values are as follows: (*a*) it will impart immense and genuine hope and strength

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did not constitute an offense under the Convention. Could the state, of which the alien group were subjects, seek a review as to the interpretation of the treaty in the International Court of Justice? If it could not seek a direct review, could it seek an interpretation by the International Court which would be binding on our domestic courts in the future?

"Should we obligate the United States to undertake to prevent and punish genocide in other states? Such seems to be the import of Article I of the Convention.

"I assume that no one will deny that the acts defined in the Convention as offenses are abhorrent and the purpose to prevent them wholly commendable. The question is as to the method and means to attain that end.

"If genocide and kindred offenses defined in the treaty are in fact international crimes, would not the wise course be to enact domestic legislation under Section 8, Clause 10, Article I of the Constitution of the United States, defining such offenses, and providing for the trial and punishment of persons committing such offenses, in our own domestic courts, where the accused will be guaranteed his constitutional rights and accorded due process under our concept of that phrase? We would thus set our own house in order, would offer the same protection to the accused as one charged with any domestic crime, and would reserve to our own courts the final determination of questions as to the interpretation of the penal statute. To agree, by international convention, to so define, try, and punish persons who commit the offenses which the treaty undertakes to define, would seem to me to wholly fulfill our international obligation, and would avoid many serious questions with respect to the incipient effects of ratification of the Convention on our constitutional and legal system and questions of policy which will arise on a consideration of concurrence by the Senate in the proposed Convention."

* * *

by LEANDER PEREZ

Following is part of the testimony by Mr. Perez, district attorney of Louisiana, before the Senate Foreign Relations Committee, January 24, 1950.

"**THE SENATE** has been requested to ratify a United Nations Genocide Convention which calls for the punishment of individual citizens of a state for the newly defined crime of genocide, and which, if ratified, would compromise our system of constitutional government and would internationalize matters which are solely within our domestic jurisdiction.

"At the same time this Genocide Convention would not make any contracting party or government responsible for genocidal crimes committed by it against its own nationals, nor would it add to the existing responsibility of any government for genocidal acts committed by or at its instigation or with its complicity against nationals of a foreign state.

"The Acting Secretary, with the endorsement of the President, recommended to the Senate that it ratify the Genocide Convention 'with the understanding that article 9 shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals.'

"Therefore it is clear that the Genocide Convention is not aimed at governments which may commit genocide against their own nationals. Furthermore, under established international law, governments are and have been responsible to other states for killings or injuries of their nationals in violation of the principles of international law.

"International law applies to nations and governments in their international realtions.

"Further, all members of the United Nations are ipso facto parties to the Statute of the International Court of Justice, which has jurisdiction to decide controversies between them in accordance with the general principles of law recognized by civilized nations.

"So, what would be the purpose of the Senate ratifying this Genocide Convention, when, first, genocide under general principles of law recognized by all civilized nations is an international crime, and secondly, the International Court of Justice has jurisdiction to adjudge against states through whose governmental policy or complicity genocide may be committed.

"It is plain that the whole purpose of the proposed Genocide Convention is to make the international crime of genocide apply to individuals and thereby to intervene in matters which are essentially within the domestic jurisdiction of the state.

"Regarding article II defining genocide, including the killing or maiming, or causing mental harm to, any member of any national, racial, or religious group, the United States representative on the United Nations Legal Committee said: 'However, if an individual is murdered by another individual, or by a group, whether composed of private citizens or government officials, as part of a plan or with the intent to destroy one of the groups enumerated in article II, the international legal crime of genocide is committed as well as the municipal-law crime of homicide.'

"The purpose, therefore, of this proposed Genocide Convention adopted by the United Nations is to extend the international crime of genocide to the individual citizens of a state.

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to the suffering hearts and minds of the enslaved Ukrainians and others who are persistently haunted by the deathly axe of Soviet national genocide; (*b*) it will focus the moral condemnation of the world on the business-like Soviet genocidists and indirectly reinforce judicious popular obstruction and opposition to their subversive agencies abroad; (*c*) because of this, it may serve to moderate the rate of Soviet genocidal advances which may be caused to become more secretive and hence more difficult to execute; (*d*) placed on the books of international law, it will stand as a formidable promise of human liberation and concrete redress; and, finally, (*e*) our true and candid adherence to its provisions will serve to enunciate the civilized principles for which we stand to fight and to which we aim to attract loyal minds in Ukraine and elsewhere in the Soviet prison and cemetery of nations."

* * *

by LT. COL. JOHN A. HUTCHINS, M.B.E.

Following are extracts from an article published in the CANADIAN ARMY JOURNAL, *January* 1949. *Technically, Col. Hutchins relates his views to Canada; but they are, of course, also applicable to the U. S.*

"THE 'CONVENTION on the Prevention and Punishment of the Crime of Genocide,' drafted in its final form by Committee and adopted unanimously in December 1948 by the United Nations Assembly at Paris, is a portentous document, the terms of which are well on the way to becoming not only the law as between nations in respect of this 'new' crime, Genocide, but an integral part of the written national law of the majority of existing states as well.

"This Convention, or Treaty, is one from which great consequences may flow, affecting in a very real way every citizen in the world; moreover, I conceive that there are implications, which will flow from implementation in which military men might well take special interest. We have only to recall the history-making War Crimes Trials which followed World War II (in which more than fifty military men were tried, convicted and sentenced), to realize that henceforth the methods of conducting wars will be scrutinized and judged by the strictest standards, and that War Crimes, including Genocide, will be punishable, whether committed by principals or accomplices, whether these are private individuals, public officers (including military), or statesmen.

"Genocide is the denial of the right of existence of entire human groups in the same sense that homicide is a denial of the right to live of individual human beings. It emerges clearly from the definition set out in the previous paragraph that Genocide is a composite of different acts of persecution and destruction.

"The prevention and punishment of Genocide concerns us in peace as well as in war. In peace the safeguarding of minorities is a prime aim of the Genocide Code. The stamping out of this crime in peace will be facilitated and brought nearer realization when its repression is based upon the written criminal law of individual states. In time of war Genocide is effected by means of a planned and concerted assault on different aspects of the life of captive peoples. To date we have been unsuccessful in efforts to control or prevent the crime in war.

"Genocide does not necessarily mean the immediate destruction of a nation, although the term would certainly apply in the case of a mass killing of the whole or part of a national population. The word is intended to signify a co-ordinated plan of various actions designed to destroy the essential foundations of the life of national groups, the ultimate aim being annihilation.

"Genocide has as its objectives the disintegration of the political, social, cultural, religious, and economic institutions of national groups, as well as the denial of personal security, liberty, dignity, health, and even life, of the individuals of such groups. Genocide has two main phases:

"(1) The destruction of the national pattern of the oppressed group; and

"(2) The imposition of the national pattern of the oppressor.

"This imposition may be made upon:

"(a) The oppressed population which is allowed to remain; or

"(b) Upon the territory alone after removal of the population and colonization by the oppressor's own nationals.

"The Nazi Germans developed an elaborate system of Genocide techniques never formerly achieved by any state. These techniques were extended to, and practiced in, widely divergent fields by the Germans; the most important of these are:

"(1) *Political*—Local self-government was destroyed and the German administrative system substituted. All reminders of the former national character were obliterated and national unity was disrupted.

"(2) *Social*—In this sphere disruption of the former national structure was achieved in part by the abolition of local laws and courts, and the imposition of German as the official language.

"(3) *Cultural*—The captive population was forbidden to use its own language in schools or in print (Luxembourg 1940); rigid control was exercised over all cultural activities by means of licensing.

"(4) *Economic*—The foundations of economic existence were destroyed (Jews were denied the means of existence); participation in business was made dependent upon collaboration. (*Continued on page* 319)

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"Bear in mind that article II, paragraph 7 of the United Nations Charter specifically provides that nothing contained in that charter shall authorize it to intervene in matters which are essentially within the domestic jurisdiction of any state.

"How can the United States Senate be asked, or urged, to ratify this so-called Genocide Convention which is a direct encroachment on the domestic affairs of this country under the Constitution of the United States, in face of the fact that adoption by the United Nations of this so-called Genocide Convention is a flagrant violation of one of the solemn provisions of its own Charter, or a violation of that part of the international agreement by which the United Nations came into being?

"The fact that the Acting Secretary points out that this so-called Genocide Convention was prepared under the chairmanship of the United States representative and that the United States delegation played an important role in the formulation of the convention, offers no alibi for the violation of the United Nations Charter provision that the United Nations shall not interfere or meddle in domestic affairs of member states.

"The American members should have known better. They should have been duly respectful of the provisions of our Constitution under which the municipal sovereignty of law enforcement is reserved to the individual States of the Union and not to the National Government, such as would result if this so-called genocide convention were ratified by the Senate and would become the supreme law of the land.

"The United States would become a contracting party if the Senate should ratify the Genocide Convention.

"Under a decision of the United States Supreme Court in the case of *Missouri* v. *Holland* (252 U. S. 416) the conclusion of a treaty by the Federal Government confers upon it authority in fields of action reserved to the States which the Federal Government would not have without such a treaty.

"At one fell swoop a large part of the municipal sovereignty reserved to all the States of the Union over the domestic affairs of their citizens and their police powers and law-enforcement authority would be supplanted.

"If this ever comes to pass, then State and county criminal judges, prosecutors, and law-enforcement officers would become largely unnecessary, and they might as well be supplanted by the Federal police, prosecutors, and courts.

"Every member of Congress well knows that the Bill of Rights was adopted as amendments to the United States Constitution promptly after its adoption by the American people, and that the States entered into the compact to create the United States Government with a solemn understanding that the States, or the people of each State in their collective sovereign capacity, would retain their right of self-government, regulation of law enforcement in regard to their domestic and personal affairs, and that these powers of government specifically were not granted to the United States.

"The provision for control of their own internal affairs was the chief concern of the States in their Constitutional Convention which wrote the United States Constitution in 1787 and they were careful to delegate to the United States Government only those powers which were deemed necessary to enable it to perform the functions of a central government which were beyond the powers of a single State, such as military operations, interstate and foreign commerce, and foreign affairs.

"So, to make the position of the States and their people more secure, the Constitution was ratified by the various States, with reservations which were later embodied in the Bill of Rights, including the tenth amendment which reserved to the States, or the people thereof, all rights and powers not delegated to the National Government nor prohibited to the States.

"After the adoption of the fourteenth and fifteenth amendments, there were those who contended for the United States Government, that its authority had been extended over the legal rights of individual persons, but the United States Supreme Court held in various cases that while the fourteenth amendment protected citizens of the United States against any State violation of their civil rights, individual invasion of individual rights was not the subject matter of the amendments, and they did not invest Congress with power to legislate upon subjects which were within the domain of State legislation or to create a code of municipal law for the regulation of private rights as between individual citizens.

"Thus what has been prohibited to the Federal Government, is attempted through the route of the so-called Genocide Convention which plainly is not aimed against a repetition of the genocide horrors of the Nazis during the last war, nor of the reported liquidation of many thousands of Russians and of other nationals by their own governments behind the iron curtain; all of which would be exempted from the Genocide Convention according to the reservation made by the representative of the United States Government.

"We should bear in mind that the United States is the only nation in the world whose Constitution provides that its treaties (or conventions) are included among the supreme law of the land on the same basis as provisions of the Constitution and acts of Congress pursuant thereto. Certainly we are not committed to destroying our constitutional form of government by any international commitment assumed in the Charter of the United Nations."

HUTCHINS—(*Continued from page* 317)

"(5) *Biological*—Depopulation by means of a variety of birth-rate controls was carried out.

"(6) *Physical*—Annihilation of national, racial and religious groups was carried out, mainly by mass killings, discrimination in feeding, and deprivation of essential clothing, fuel and medicines.

"(7) *Religious*—Religious influence was vigorously attacked, among other means, by pillaging church property and persecution of the clergy.

"(8) *Moral*—An atmosphere of moral debasement was encouraged, directing mental energy from moral to immoral thinking. Pornographic publications and cinema shows were made available to the exclusion of all others; gambling and the excessive consumption of strong liquors were encouraged.

"The reader will by now have remarked to himself that 'Genocide' is in fact not a new crime; he will be quite correct in a sense, although, as already stated, the term is of recent origin and is supposed to denote the modern development of an ancient, if hardly a venerable practice. Histories of the past contain many accounts of wars of savage butchery and extermination. The actions of the Assyrians in the destruction of Damascus, 732 B.C.; Samaris, 722 B.C.; Babylon, 689 B.C.; and Sidon, 677 B.C., when entire communities were destroyed and whole populations either killed or taken captive, may rightly be considered notable examples of Genocide. The terrible deeds of Tamburlaine, between the years 1383 and 1400 A.D., bear the stamp of Genocide, as indeed do the massacres of Jenghis Khan. Could there be a better known case of total destruction, for instance, than that of Carthage in 146 B.C.? The preamble to the U.N. Convention outlawing Genocide takes account of the antiquity of man's genocidal tendencies by stating therein that the contracting parties recognize that in all periods of history genocide has inflicted great losses upon humanity and that liberation from the odious scourge requires international cooperation.

"The doctrine that war is directed against sovereigns and armies and not against subjects and civilians has been disregarded by belligerents since wars began, the excessively horrible examples of the flagrant flouting of this principle seen in World War II are unfortunately, or should we say fortunately, fresh within the memory of each of us. Genocide is the antithesis of the rule that war is conducted against states and armies and not against populations. It would seem to the writer that in this age of 'total' wars, the commission of the crime of Genocide by major participants will for the future be well-nigh unavoidable. The modern concept of total war conceives of civilian population centers, and base industries of all types, warlike and otherwise, as being strategic targets of prime importance—scarcely less important than military establishments. Genocide is an aberration which threatens to become the norm unless we, the peoples of the world, enact and enforce a rule which outlaws it. The new convention is but the commencement of this task. To wage a major total war, in this atomic era, certainly an aggressive total war, is, so it would seem, to be automatically guilty of Genocide and thus to be punishable under international law. Will the realization of this fact, coupled with the memory of the Post World War II War Crimes Trials, and their implications for the future, help to deter the would-be modern aggressor? It is the fervent belief and hope of the framers of the Genocide Convention that these considerations will in fact deter aggressors.

"To give real effect to the Genocide Convention much remains to be done. The requirements which must be met may be divided into two categories, namely, those which are immediate, and those which may be termed secondary, though these latter are scarcely less important than those in the first category. Insofar as Canada is concerned, the immediate requirement is the enactment, by the Dominion Parliament, of legislation having the dual purposes of, firstly, ratifying the Convention Outlawing Genocide, and, secondly, incorporating the terms of the Convention into our Canadian Criminal Code. It is anticipated that two separate and distinct Acts of Parliament may be adopted to achieve these purposes. In any event, the act of ratification implies the intention to effect the indicated changes in our Criminal Code; ratification without subsequent or simultaneous amendment to the Criminal Code would, in fact, amount to a nullity, since implementation of the Convention can only result upon the completion of both operations. For the future, the main requirement is a system of international controls, operating in conjunction with an international court of justice having criminal jurisdiction, enforcing what amounts to these beginnings of a written international Criminal Code.

"It must be our avowed aim to prevent Genocide during future wars involving occupation; this will necessitate the prior setting up of a controlling organization or agency (or the use of an existing one such as the United Nations) vested with the power to visit, inspect, and enquire into the methods of treating captive populations, etc. At present we have no means of determining the plight of peoples under occupation or of alleviating their sufferings. Liberation is the only effectual treatment, and, as we well know, this event all too often comes too late for remedies to be possible. Neither liberation nor reparation can restore an already forfeited life."

TREATY TEXT—(*Continued from page* 296)

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal* and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effective by a written notification addressed to the Secretary-General of the United Nations.

Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

QUESTIONS OF LAW—(*Continued from page* 300)

law unless a scrupulous respect obtains for the integrity of international instruments. Yet a tendency now seems to prevail in some quarters to undermine that respect by torturing the meaning of great international instruments and by forcing them to serve purposes for which they were never designed, purposes at variance with the desires entertained by Governments when the instruments were brought into force.

"If governments cannot have confidence that the instruments by which they bind themselves will not be made to serve unintended purposes, if respect is not paid to the terms and tenor of the obligations imposed by such instruments, the result may be a reluctance to assume further commitments and the progressive development of international law may be seriously retarded. An important function of the United Nations might thus be frustrated."

VI

Shall the American people, with their guaranties of protection in the trials of individuals not present in other countries, agree to extradition and trials of Americans before foreign or international tribunals for violations of international law?

With the possible exception of divided opinion as to prosecution and trial for war crimes, our experience in the 12 conferences with lawyers in various States furnishes an emphatic "no" to this question. It is said by lawyers participating in the war trials that there were many privileges of the accused in criminal trials under our system which were not present in those trials. Add to that the problems of extradition, language, procedure, and cost of defense, and it is easy to see why American lawyers should be of decided opinions on the subject. The difficulty in securing approval of the United States for the World Court may point the way for our representatives in the United Nations on considering proposals for other international tribunals.

VII

What means are available to fit our structure into the international picture without destruction of our basic principles?

Must we have a constitutional amendment to put the United States on a parity with other nations on the effect of treaties as domestic laws? If, from the many fields of effort of the United Nations more treaties covering domestic questions are offered, such action may become absolutely necessary. If not, the Senate of the United States may be obliged to refuse ratification.

The reservation route did not work in the case of the League of Nations. The subject must be explored and it must be understood by the people that reservations may be necessary in order to secure adjustment of the covenant of Human Rights and other treaties to our Constitution.

STATEMENT OF OWNERSHIP

(Required by Act of Congress, August 24, 1912, amended March 3, 1933, and July 2, 1946)

OF THE CONGRESSIONAL DIGEST, published monthly (except July and August), at Washington, D. C., for October 1, 1950.

Before me, a Notary Public in and for the District of Columbia, personally appeared Philip B. Yeager, who, having been duly sworn according to law, deposes and says that he is the Editor of The Congressional Digest and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, as amended March 3, 1933 and July 2, 1946 to wit:

1. That the names and addresses of the publisher, editor, and business managers are: Publisher, A. Gram Robinson; Editor, Philip Yeager; Business Manager, Norborne T. N. Robinson, 3rd, all of 1631 K St., Washington 6, D. C.

2. That the owner is: The Congressional Digest Corp., 1631 K St., Washington 6, D. C. A. Gram Robinson, principal stockholder.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: None.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

PHILIP B. YEAGER

Signature of Editor

Sworn to and subscribed before me this first day of October, 1950, James W. Clark, Notary Public. (My commission expires Dec. 20, 1951.)

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